

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

BRIGHT RESPONSE, LLC * Civil Docket No.
 * 2:07-CV-371
VS. * Marshall, Texas
 *
 * August 6, 2010
GOOGLE, INC., ET AL * 1:15 P.M.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE JUDGE CHAD EVERINGHAM
UNITED STATES MAGISTRATE JUDGE

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(Proceedings recorded by mechanical stenography,
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* * * * *

P R O C E E D I N G S

LAW CLERK: All rise.

(Jury in.)

THE COURT: Please be seated.

Who will be your next witness?

MS. DOAN: Your Honor, at this time, we
call Rosanna Piccolo, Chase employee. We call her by
videotape.

THE COURT: All right.

MS. DOAN: Your Honor, this does have
both designations of the Plaintiff and the Defendant.

THE COURT: All right. If you will lower
the lights, please.

(Video clip playing.)

QUESTION: Can you please state and spell

1 your name for the record.

2 ANSWER: First name, Rosanna,
3 R-O-S-A-N-N-A, last name, Piccolo, P-I-C-C-O-L-O.

4 QUESTION: Okay. If I refer to the '947
5 patent, do you know what that is?

6 ANSWER: I believe it is the patent that
7 my -- my company, Chase Manhattan Bank, is part of with
8 the work that I performed when I worked for -- when I
9 worked for them.

10 QUESTION: Okay. And you understand you
11 are a named inventor on the patent?

12 ANSWER: Yes.

13 QUESTION: What is the EZ Reader?

14 ANSWER: EZ Reader is the name of the
15 application that was given to this software application.

16 QUESTION: The software application that
17 was eventually patented in the '947 patent?

18 ANSWER: Correct.

19 QUESTION: Okay. What were -- what was
20 your position at the time of the development of the EZ
21 Reader?

22 ANSWER: I was what you would call a
23 project manager. I was the liaison between the
24 business, who we were developing this application for
25 within Chase, and the -- and the vendor that was

1 creating this application for us.

2 QUESTION: Was the EZ Reader application
3 ever deployed at Chase?

4 ANSWER: Yes.

5 QUESTION: And when was that?

6 ANSWER: I believe it was either late '95
7 or early '96.

8 QUESTION: And what -- what forms the
9 basis for your recollection of that timeframe?

10 ANSWER: I know that I participated in a
11 conference in '96, and I believe that the application
12 was already up and running in what we would call a
13 production environment.

14 QUESTION: Okay. And was it being used
15 to -- in this production environment, was it responding
16 to e-mails from customers at that point?

17 ANSWER: Yes.

18 QUESTION: Okay. If you could look on
19 the same page down, I guess, in the -- in the first
20 paragraph here towards the middle in the abstract, it
21 says: Phase 1 of EZ Reader was deployed in the first
22 quarter of 1996 and handles up to 80 percent of incoming
23 mail automatically.

24 You see that?

25 ANSWER: Yes.

1 QUESTION: Is -- is it your understanding
2 that that is accurate?

3 ANSWER: I believe so.

4 QUESTION: Okay. And is this what you
5 were referring to earlier, when you were indicating that
6 you thought that the EZ Reader had been deployed in this
7 timeframe?

8 ANSWER: Yes.

9 QUESTION: Okay. Does this article
10 that's in Cohen Exhibit 4 describe the EZ Reader product
11 that was deployed in the first quarter of 1996?

12 ANSWER: To the best of my knowledge,
13 yes.

14 QUESTION: Do you know why you were added
15 as an inventor?

16 ANSWER: I believe because I was the
17 project manager for Chase.

18 QUESTION: On the EZ Reader project?

19 ANSWER: Correct.

20 QUESTION: Referring to the EZ Reader, it
21 says: The application combines preprocessing rules for
22 parsing and case-based retrieval with a domain specific
23 knowledge base. Other text interpretation applications
24 have successfully used a hybrid approach.

25 Do you see that?

1 ANSWER: Yes.

2 QUESTION: Do you have any reason to
3 believe that that is not accurate?

4 ANSWER: I -- I don't. I have no -- no
5 comments. I really don't -- I don't know.

6 QUESTION: And just -- and I just want to
7 be clear, it's correct that the EZ Reader was used as
8 Chase's external public e-mail system to respond to
9 customers' e-mail prior to April, 1996?

10 ANSWER: Correct.

11 QUESTION: And so prior to April 1996,
12 the EZ Reader would have been used to respond to real
13 customers' e-mails?

14 ANSWER: Correct.

15 QUESTION: And by real customers, I mean
16 the actual customers of Chase?

17 ANSWER: Correct. Customers or potential
18 customers.

19 QUESTION: Prior to April 1996, the EZ
20 Reader was receiving electronic messages from a source
21 such as a customer, right?

22 ANSWER: Correct.

23 QUESTION: And is it your understanding
24 that prior to April of 1996, that the EZ Reader would be
25 interpreting electronic messages using rule-based and

1 case-based knowledge engines?

2 ANSWER: Yes.

3 QUESTION: And is it your understanding
4 that prior to April of 1996, the EZ Reader would
5 retrieve one or more predetermined responses
6 corresponding to the interpretation of them by the
7 rule-based and case-based knowledge engine for delivery
8 back to the source, i.e., the customer?

9 ANSWER: Yes.

10 QUESTION: One of the things that you had
11 mentioned before that the EZ Reader did was -- that --
12 that sometimes the e-mail would be sent to a person to
13 review and respond, and then sometimes it would be
14 responded to automatically; is that correct?

15 ANSWER: Correct.

16 QUESTION: Okay. And was that true in
17 the system that was deployed prior to April 1996?

18 ANSWER: Yes.

19 MR. WEISS: Before we continue, Rosanna
20 wanted to clarify a prior question you had asked her,
21 which was, was EZ Reader deployed prior to April 1996.

22 ANSWER: And I based my answer on what I
23 recall, going to the conference, that AAAI conference in
24 August, September, and along with the documentation that
25 I -- that I reviewed, that I based my answer on that.

1 But I do not recall the specific month or day when it
2 was actually put into production.

3 QUESTION: If you look in the abstract,
4 it says in the middle of the page there, Phase 1 of the
5 EZ Reader was deployed in the first quarter of 1996, and
6 handles up to 80 percent of the incoming mail
7 automatically?

8 ANSWER: Correct. I see it.

9 QUESTION: Okay. And so -- so to the
10 best of your recollection, that's accurate, right?

11 ANSWER: I cannot say for certain -- with
12 certainty exactly when it was deployed.

13 QUESTION: Do you recall whether
14 Brightware made presentations to Chase on the EZ Reader?

15 ANSWER: Yes.

16 QUESTION: And how often did that occur?

17 ANSWER: This particular document, I see
18 the Chase logo is different, so I don't know whether
19 this was after the Chase/Chemical merger, because the
20 logo was changed.

21 QUESTION: Uh-huh.

22 ANSWER: I know that we made
23 presentations to the new technology management team that
24 consisted more of Chemical Bank senior executives.

25 QUESTION: Okay. When did that merger

1 take place?

2 ANSWER: Oh, I believe '96, '97. I don't
3 know specific -- specific dates.

4 QUESTION: On Rice 359, August 15th,
5 1995, one of the -- one of the tasks for you, the third
6 one down, says develop a document outlining decisions
7 that need to be made regarding testing.

8 ANSWER: Yes, I see it.

9 QUESTION: Do you know what that is?

10 ANSWER: Specifically, no. I believe it
11 was a test plan, to develop a test plan, but
12 specifically, no, I don't recall the exact document that
13 was created.

14 QUESTION: Do you recall the timing of
15 the test plan?

16 ANSWER: No.

17 QUESTION: So it -- was it deployed at
18 the time -- was EZ Reader deployed at the time this
19 manual was created?

20 ANSWER: I believe so, but I cannot say
21 with certainty specifically when it was deployed.

22 QUESTION: And then underneath it says:
23 I acknowledge the duty to disclose all information known
24 to be material to patentability in accordance with Title
25 37, Code of Federal Regulations 156.

1 Do you see that?

2 ANSWER: Yes.

3 QUESTION: Were you aware of the scope of
4 your duty to disclose pursuant to that title and section
5 at the time you signed this?

6 ANSWER: I believe that before I signed
7 it, it was reviewed by Chase Legal, and I was given the
8 approval to sign it.

9 QUESTION: Okay. That's not really my
10 question. My question is whether you personally
11 understood what your duty was to disclose information
12 under Title 37, Section 156 that's referred to there?

13 ANSWER: I believe so.

14 QUESTION: Why -- why do you believe
15 that?

16 ANSWER: Why do I believe it?

17 It is not my practice to sign documents
18 before understanding what they are or before obtaining
19 prior approval.

20 QUESTION: I want to direct your
21 attention back to what has been marked as Exhibit
22 Cohen 5 as JP -- Production No. JPM30 on the front page
23 of it.

24 And do you recall when -- referring to
25 the AAAI conference, do you recall when that conference

1 took place?

2 ANSWER: I believe it was either August
3 or September of 1996.

4 QUESTION: And are you basing that --
5 that answer on reviewing the cover page, or is that just
6 your general recollection of when you attended the
7 conference?

8 ANSWER: It was based on looking on the
9 search itself, on the internet.

10 QUESTION: So we've already established
11 that you can with certainty that was done -- that was
12 deployed before 2000.

13 Can you state with certainty that it was
14 deployed as of the time you attended the AAAI conference
15 in 1996, it being the EZ Reader software.

16 ANSWER: Yes, I believe so.

17 QUESTION: But prior to your attendance
18 of the AAAI -- excuse me -- AAAI conference in 1996, you
19 have no direct recollection of when the EZ Reader
20 software was deployed, correct?

21 ANSWER: That is correct.

22 QUESTION: Okay. And this, again, is the
23 AAAI article, correct?

24 ANSWER: Correct.

25 QUESTION: And you are listed as a -- an

1 author of the document?

2 ANSWER: Correct.

3 QUESTION: And do you have any reason to
4 believe that the contents of Cohen Exhibit 4, this
5 article, are incorrect?

6 ANSWER: No, I do not.

7 QUESTION: And if you had noticed
8 something that was incorrect in a document that had your
9 name on it, would it have been your normal practice to
10 point that out and try to get it fixed?

11 ANSWER: Yes.

12 (End of video clip.)

13 THE COURT: Does that complete the offer?

14 MS. DOAN: It does, Your Honor.

15 THE COURT: Who will be your next
16 witness?

17 MS. DOAN: Our next witness is Anthony
18 Angotti, and he -- we had a problem with the last
19 videotape, Your Honor, so we're going to read it in.
20 It's really short.

21 THE COURT: Okay.

22 MS. DOAN: He's a Chase employee as well.

23 THE COURT: Are you going to be
24 presenting?

25 MS. DOAN: I am going to do the questions

1 and have Mr. Thames read the answers. Is that okay?

2 THE COURT: Well, for both sides of the
3 case?

4 MS. DOAN: Yes, sir. That's my
5 understanding.

6 THE COURT: All right. For convenience
7 purposes, Ladies and Gentlemen, she's going to read the
8 questions that were asked by both the Defense side of
9 the case as well as the Plaintiff's side of the case.
10 Let's proceed.

11 (Excerpt read.)

12 QUESTION: Good morning, Mr. Angotti.

13 ANSWER: Good morning.

14 QUESTION: Okay. Were you involved in
15 the development of a product called EZ Reader?

16 ANSWER: Yes, I was.

17 QUESTION: What was your role in that
18 project?

19 ANSWER: My role in that project is
20 that -- that was one of the projects that I was -- I had
21 management responsibility for.

22 QUESTION: Who was on the team that was
23 working on EZ Reader?

24 ANSWER: I don't -- I don't think I can
25 recall every name, but the main group that was working

1 on it was Amy Rice, Julie Hsu, and Rosanna Piccolo. I
2 was also a part of that subteam. That was the main
3 nucleus group that carried on the day-to-day kind of
4 project.

5 There were other folks that got involved
6 in the business unit and an IT group, but, you know,
7 they played various support roles, project management
8 roles.

9 Connie Lynch was part of the team, not EZ
10 Reader per se, but she worked closely with Amy -- Amy
11 Rice, on the list of products that we were working on.

12 QUESTION: And you said the EZ Reader was
13 deployed by the first quarter of 1996; is that right?

14 ANSWER: Yes.

15 QUESTION: Okay. Understood.

16 You keep referring to the first quarter
17 of 1996. Do you have any more specific recollection of
18 the deployment date for EZ Reader?

19 ANSWER: I do, yes.

20 QUESTION: What is that?

21 ANSWER: I recollect seeing a date in the
22 AAAI article that was published. I think it was March
23 20-something. So it was -- that's the date that I
24 recall just having seen there, but I've always referred
25 to it as the first quarter. That's consistent with my

1 project management.

2 QUESTION: Right. So based on your
3 memory and recollection, is it consistent that -- let me
4 start over.

5 Is this description consistent with your
6 memory of where the project stood as of the first
7 quarter of 1996?

8 ANSWER: It's not consistent with my --
9 with my memory, because I had nothing to do with the
10 corporate side. I -- that's just not -- you know, I
11 didn't have any role with, you know, chase.com.

12 QUESTION: I see. So you're not in a
13 position to say whether that happened or not?

14 ANSWER: That's correct. I am not in the
15 position to say that. And, again, if this -- this
16 document is on or before -- on or after the date that's
17 written on here, it's -- again, my involvement was
18 really tailing off there.

19 QUESTION: You have no reason to believe
20 anything in this document is not accurate?

21 ANSWER: No.

22 QUESTION: Is that correct?

23 ANSWER: No.

24 QUESTION: I mean, focusing just on that
25 paragraph then that we've been discussing?

1 ANSWER: I just -- I don't have any basis
2 to comment either way.

3 QUESTION: Got it. Okay.

4 Do you recall if you reviewed the document
5 before it was published or submitted to the AAAI?

6 ANSWER: Yes. I did review it. There's
7 certain policies within Chase about documents that go to
8 the external world, that they have to go through a
9 process of being reviewed. And I was one of the
10 reviewers.

11 QUESTION: So generally speaking, though,
12 had there been something in your review of this document
13 that jumped out at you as being not accurate with
14 respect to EZ Reader, would you have made sure that was
15 corrected before the article was sent outside the
16 company?

17 ANSWER: Yes.

18 QUESTION: That's fine. Take your time.

19 Farther down in the paragraph, it says
20 that Phase 1 of EZ Reader was deployed in the first
21 quarter of 1996 and handled up to 80 percent of incoming
22 mail automatically depending on message content.

23 ANSWER: Yes, I see that.

24 QUESTION: Is that consistent with your
25 testimony earlier today that EZ Reader was deployed by

1 the first quarter of 1996?

2 ANSWER: Yes, it is consistent.

3 QUESTION: I believe this is the same
4 thing we were just looking at. However, it has some
5 handwriting on it.

6 ANSWER: The cover and -- and it has the
7 date on the cover, on the front page as well. It looks
8 like --

9 QUESTION: Oh, yes.

10 ANSWER: -- it's either August 18th, 1996
11 or April.

12 QUESTION: On the first page of text --
13 I'm sorry -- on the first page of text in the
14 handwriting at the bottom, it says August 4th through
15 8th, 1996.

16 ANSWER: Okay.

17 QUESTION: Is that consistent with your
18 memory and what it looks like on this first page?

19 ANSWER: No, but it makes sense it would
20 be that. I just recall that it's in 1996. It's
21 consistent with my recollection.

22 QUESTION: Did you provide any input on
23 what was actually claimed in the patent?

24 ANSWER: Yes. In terms of what the
25 patent is for?

1 QUESTION: Yes.

2 ANSWER: Yes.

3 QUESTION: Do you believe that Chase
4 benefited by having deployed the EZ Reader system?

5 ANSWER: I believe that Chase benefited
6 from having EZ Reader deployed in the first quarter of
7 1996 as follows: For me, the purpose of the deployment
8 was to legitimize the application and to demonstrate
9 under fire, if you will, that it was capable of doing
10 the things that we were claiming that it would do and so
11 that -- you know, in the word deploy, I mean, these
12 words are used loosely based on, you know, who the
13 orator is in terms of the words.

14 To me, deployed means implementing in
15 ChaseDirect in a production environment to legitimize
16 the application and to prove that it worked and to prove
17 that it could get -- realize the benefits that we were
18 claiming, and so that's what we did.

19 QUESTION: And when it was deployed, was
20 it used to respond to actual --

21 ANSWER: Yes, it was.

22 QUESTION: -- e-mail messages, correct?

23 ANSWER: We needed to do that to
24 substantiate the claims.

25 (End of deposition clip.)

1 MS. DOAN: Your Honor, that completes the
2 proffer of Anthony Angotti.

3 THE COURT: Okay. Who will be your next
4 witness?

5 MS. DOAN: Your Honor, we call Phil Klahr
6 by video as well, and he was the program director for
7 the AAAI conference in 1996.

8 THE COURT: All right. Dim the lights.

9 MS. DOAN: And it's a Plaintiff's and
10 Defense proffer, Your Honor.

11 THE COURT: Thank you.

12 (Video clip playing.)

13 QUESTION: You were involved at one time
14 with a organization called the AAAI, correct?

15 ANSWER: Right.

16 QUESTION: How long were you involved
17 with the AAA -- AAAI?

18 ANSWER: As a member, I probably joined
19 in graduate school. So probably in the late '60s, early
20 '70s, 1970s. I was studying artificial intelligence.
21 And I have a Ph.D. in artificial intelligence, so that
22 was my principal organization that I was involved in.
23 I also started working on their behalf, for example, in
24 the various program committees, and one of them is the
25 conference that you're interested in, the Innovative

1 Applications of Artificial Intelligence Conference.

2 And I was on the program committee of
3 that conference from about 1991 to 2000. And being on
4 the program committee meant that I would review papers
5 for a conference and make decisions as to whether papers
6 should appear in the conference or not.

7 QUESTION: What does AAAI stand for?

8 ANSWER: Originally, it stood for the
9 American Association of Artificial Intelligence, but it
10 became more of a global organization. So it's
11 changed -- it did not change its acronym, but it changed
12 its name to Association for the Advancement of
13 Artificial Intelligence, also AAAI.

14 QUESTION: Can you give me a little bit
15 of an overview of the process of submitting a paper to
16 the AAAI conference in hopes of being published?

17 ANSWER: Sure. The conference would
18 issue a call for papers, which was a description of what
19 the conference was looking for from the papers, an
20 address in which to submit your papers, and a date for
21 which those papers needed to be submitted.

22 Papers would then be sent to the
23 conference. There was a program committee consisting of
24 about eight to ten professionals, each of which would
25 independently review some subset of those papers. Each

1 paper typically had two reviewers.

2 And then the program committee would then
3 meet together face-to-face and go through all of the
4 papers, the reviews of the papers, and make a decision
5 on each paper in terms of acceptance, rejection, or some
6 other disposition.

7 The authors of the papers would then be
8 notified, and for those papers that were accepted, they
9 had to provide the final versions of their papers to the
10 AAAI for publication in a book.

11 QUESTION: Were papers that were
12 submitted to the IAAI kept confidential?

13 ANSWER: Yes.

14 QUESTION: Do you have any personal
15 knowledge about the EZ Reader project?

16 ANSWER: No, other than what I've read in
17 the Rice paper.

18 QUESTION: So you agree that at least as
19 of December 21st, 1995, Mr. Shrobe was likely aware that
20 the EZ Reader project was not deployed at that time,
21 correct?

22 ANSWER: I would agree with that.

23 QUESTION: Okay. Do you have any
24 understanding of what Mr. Shrobe would likely have been
25 aware of after that time, December 21st, 1995?

1 ANSWER: I do not.

2 QUESTION: You would agree that at least
3 as of December 21, 1995, Mr. Shrobe encouraged a paper
4 like the Rice article be submitted to the IAAI
5 conference for consideration, correct?

6 ANSWER: Yes.

7 QUESTION: Do you have any personal
8 knowledge as to whether Mr. Shrobe or anyone else
9 actually checked to see whether the EZ Reader project
10 described in the Rice article was deployed at the time
11 of the PC meeting?

12 ANSWER: No, I do not.

13 QUESTION: Mr. Khlar, could you please
14 describe the purpose of the IAAI conference?

15 ANSWER: Yes. The IAAI conference was
16 created to showcase business uses of artificial
17 intelligence technology. And the best way to do that
18 was to have papers that described applications that were
19 deployed in an operation within a business environment
20 and that had achieved business success.

21 And by encouraging papers of that sort,
22 it would broadcast to the business community the
23 relevance and importance of using artificial
24 intelligence technology in the business community.

25 QUESTION: Were you on the 1996 IAAI

1 committee that considered the EZ Reader article for
2 publication?

3 ANSWER: I was.

4 QUESTION: Okay. I'd like you to look at
5 Khlar Exhibit 2, which is your declaration, and
6 specifically at Exhibit A.

7 What's the title of this document?

8 ANSWER: The title is The Eighth Annual
9 Innovative Applications of Artificial Intelligence
10 Conference Call for Papers, Panels and Invited Talks.

11 QUESTION: Do you recognize this
12 document?

13 ANSWER: I do.

14 QUESTION: Can you describe what the
15 document is?

16 ANSWER: The document describes the goals
17 of the IAAI conference, and more specifically, discusses
18 the criteria for admission of papers to the conference
19 and what the criteria are and what the program committee
20 is looking for in papers for this conference.

21 It also lays out invitations for invited
22 speakers that perhaps want to present or panels to
23 organize for the conference, as well as laying out the
24 dates of submission and the timetable and where to
25 submit papers and suggestions for the conference.

1 QUESTION: Does this document describe
2 the guidelines and requirements that would have been
3 applied to the EZ Reader article that was submitted to
4 the IAAI in 1996?

5 ANSWER: Yes, very specifically.

6 QUESTION: Do you see the heading in this
7 document entitled IAAI Case Study Papers?

8 ANSWER: I do.

9 QUESTION: Can you please describe what a
10 case study paper is?

11 ANSWER: Yes. As it says explicitly,
12 papers must describe deployed applications with
13 measurable benefits.

14 QUESTION: And what does it mean to
15 say -- or do you have any understanding of what this
16 paper means when it says deployed applications?

17 ANSWER: Yes, I do. It means that
18 applications are in use -- are being used in the
19 business environment by corporations, so actually
20 deployed, implemented, and in use in achieving benefits.

21 QUESTION: Did the IAAI have any
22 requirements for publishing case study papers?

23 ANSWER: The requirements are laid out in
24 this call for papers document.

25 QUESTION: And what are those

1 requirements?

2 ANSWER: The paper has to describe a
3 deployed application. Again, an application that's used
4 in -- in business, not just being tested but actually in
5 use, and giving corporations some measurable benefits
6 for those particular applications.

7 It also lays out pretty much an outline
8 of what the paper should be and what the different
9 components of the paper should be, namely, a description
10 of the problem, a description of the program, the use,
11 the current use of the application and its payoff, how
12 it was built, what the development was like, and how the
13 application is being maintained now that it's in
14 deployment.

15 QUESTION: Would the IAAI committee have
16 considered a case study paper for publication if it had
17 reason to believe that the system had not been deployed?

18 ANSWER: For the 1996 conference, no.

19 QUESTION: For the 1996 conference, would
20 the IAAI committee have considered a case study paper
21 for publication if it described a system that was being
22 tested with successful results but had not yet been
23 deployed publicly?

24 ANSWER: No. I mean, typically, the
25 recommendation would be to submit the paper again next

1 year once it was actually deployed.

2 QUESTION: Are there any circumstances
3 under which the program committee would have waived its
4 requirement that case study papers describe an
5 application that was actually deployed?

6 ANSWER: Not in '96, no.

7 QUESTION: Were there any circumstances
8 in 1996 under which the IAAI would have allowed a paper
9 to be published if it had false or inaccurate
10 statements?

11 ANSWER: Absolutely not.

12 QUESTION: How seriously did the IAAI
13 consider its requirement to published papers to be
14 factually accurate?

15 ANSWER: The IAAI organization is a
16 highly integrable organization, and there's no way they
17 would publish a paper knowing that there was false
18 information or inaccurate information in it.

19 QUESTION: And how seriously did the IAAI
20 consider its requirement that published case study
21 papers describe an application that had already been
22 deployed in the field?

23 ANSWER: It was a firm requirement.
24 Those were the papers we were looking for, and that was
25 whole purpose of the conference was to showcase deployed

1 applications.

2 QUESTION: Okay. I'd like you to please
3 turn to Exhibit B in your declaration. Can you please
4 describe what you're looking at?

5 ANSWER: I'm looking at the -- a copy of
6 the EZ Reader paper that appeared -- it looks like the
7 copy is directly from the proceed -- published
8 proceedings of that conference. It lists page numbers
9 as well. So it's a copy of the article from the
10 proceedings.

11 QUESTION: Was this paper accepted for
12 publication by the IAAI?

13 ANSWER: Yes.

14 QUESTION: And do you have any
15 understanding of when the IAAI would have met to decide
16 whether or not to allow this paper to publish?

17 ANSWER: It would be March 1996.

18 QUESTION: Did this paper meet the
19 requirements of the IAAI for publication?

20 ANSWER: It did.

21 QUESTION: Are you aware of the IAAI
22 having any information that the statements in this
23 article were false or misleading?

24 ANSWER: No.

25 QUESTION: Were you personally aware of

1 any false or misleading statements in this article?

2 ANSWER: No.

3 QUESTION: Are you aware of any case
4 study articles that were published by the IAAI in 1996
5 that described a system that was not actually deployed?

6 ANSWER: No.

7 (End of video clip.)

8 MS. DOAN: Your Honor, that completes the
9 proffer of Phil Khlar.

10 THE COURT: Okay. Who will be your next
11 witness?

12 MS. CANDIDO: Your Honor, Defendants call
13 Chris Bakewell.

14 THE COURT: Mr. Bakewell.

15 Was this witness previously sworn?

16 MS. CANDIDO: I don't think he has been.

17 THE COURT: All right. Come around and
18 allow Ms. Lockhart to administer the oath.

19 (Witness sworn.)

20 WILLIAM CHRISTOPHER BAKEWELL, DEFENDANTS WITNESS, SWORN

21 DIRECT EXAMINATION

22 BY MS. CANDIDO:

23 Q. Good afternoon, Mr. Bakewell.

24 A. Good afternoon.

25 Q. Would you state your full name for the record.

1 A. My name is William Christopher Bakewell. I go
2 by Chris.

3 Q. Mr. Bakewell, please tell the jury where you
4 are from and a little bit about yourself.

5 A. Well, I live in Sugar Land, Texas. I am
6 married. I've been married for 18 years. I have three
7 children, an 8-year-old boy, a 10-year-old girl, and a
8 very complicated 13-year-old boy.

9 Q. What do you do for a living?

10 A. I am a management consultant. I -- I focus on
11 the valuation of intellectual property assets.

12 Q. Are you employed by a firm?

13 A. I am. I work for a firm called Duff & Phelps
14 where I am a managing director.

15 Q. What is your area of expertise?

16 A. My area of expertise is valuation of
17 intellectual property rights.

18 Q. What is your educational background?

19 A. Well, I received a bachelor's degree from
20 Bradley University in Peoria, Illinois. That was in
21 business management and administration.

22 I received a master's degree from the
23 University of Maryland at College Park. That was in
24 finance, an MBA in finance.

25 Q. Did you receive either of those degrees with

1 honors?

2 A. I did. They both were with honors. The
3 undergraduate degree was with high honors, and then
4 graduate school, I was a graduate fellow.

5 Q. Have you been published in the area of
6 intellectual property valuation?

7 A. Yes, ma'am, I have. I've had several articles
8 published on the valuation of intellectual property in
9 peer-reviewed journals. I've also had articles
10 published on licensing.

11 Q. And do you have a chapter of a book coming out
12 soon?

13 A. I do. It will be out in a couple of months.

14 Q. Have you ever negotiated any real-world patent
15 licenses?

16 A. Yes, I have. In my career, in my 20 years
17 that I've been working, plus or minus, I've spent about
18 eight years in industry where I had responsibility for
19 negotiating complex contracts, which included patent
20 licenses.

21 And then in my career as a consultant, I
22 advise companies as to decisions and financial aspects
23 of license agreements.

24 Q. Do you have any professional certifications?

25 A. Yes, ma'am, I do. I am an accredited senior

1 appraiser focusing on business valuation, and in
2 particular, I focus on valuation of intellectual
3 property rights and IP-rich businesses.

4 I'm also a certified licensing professional.
5 That's a designation from the Licensing Executive
6 Society. It's the type of licensing that we're talking
7 about here today.

8 Q. Have you been qualified as an expert witness
9 in federal court before?

10 A. Yes, ma'am, I have.

11 Q. And have you ever worked as an expert witness
12 in a patent case with Google before?

13 A. Yes, I have. I think three times.

14 Q. This is your third time?

15 A. Yes, ma'am.

16 Q. Have you been asked to perform a damages
17 analysis in this case?

18 A. Yes, I have.

19 Q. Is your firm, Duff & Phelps, being paid for
20 your time in connection with the case?

21 A. My firm is paid \$475 an hour for my time.

22 Q. And what is the total amount that Duff &
23 Phelps has billed in connection with this matter to
24 date?

25 A. Approximately \$250,000.

1 Q. Does your compensation in any way depend on
2 the outcome of this litigation?

3 A. No, ma'am, not in any way.

4 Q. Does the compensation of your firm, Duff &
5 Phelps, depend in any way on the outcome of this
6 litigation?

7 A. No, ma'am, not at all.

8 MS. MS. CANDIDO: Your Honor, Google
9 moves to qualify Mr. Bakewell as a qualified expert in
10 patent damages.

11 MR. HUESTON: No objection, Your Honor.

12 THE COURT: I will hear his opinion.

13 Q. (By Ms. Candido) Mr. Bakewell, what was your
14 assignment in this case?

15 A. Well, it was really twofold.

16 First was to review and analyze the opinions
17 of Dr. Becker, and the second was to form my own
18 opinions regarding damages in this matter.

19 Q. And what are your opinions regarding damages
20 in this matter?

21 A. Well, my opinions are for a lump-sum royalty
22 to the '947 patent for Google. The appropriate
23 reasonable royalty is \$2.5 million. That's for the life
24 of the '947 patent.

25 And over the damages period, the six years

1 from the alleged date of first infringement until today,
2 \$1.1 million.

3 Q. Now, you understand, don't you, that Google
4 believes that it does not infringe the '947 patent?

5 A. Yes, ma'am, I do.

6 Q. And you understand that Google believes that
7 the '947 patent is invalid, correct?

8 A. Yes, ma'am.

9 Q. And you understand that Google believes that
10 there should be no damages in this case?

11 A. I do.

12 Q. Do you understand that?

13 A. Yes, I do.

14 Q. So why are you calculating damages for Google?

15 A. Well, it's essentially an exercise in case the
16 jury finds that there is validity, enforceability, and
17 infringement of the '947 patent.

18 Q. So in the event that the jury finds that,
19 Google's asked you to present your view?

20 A. Then there would be -- in the event, that's
21 correct. That's correct.

22 Q. So in forming your opinions, you were asked to
23 assume that Google infringes the patent and that the
24 patent is valid; is that correct?

25 A. Yes, ma'am. That's an assumption that I have

1 made.

2 Q. If the patent is not infringed or the patent
3 is invalid, then what happens?

4 A. Well, there's no damages. My testimony
5 doesn't really matter.

6 Q. Like Dr. Becker, you've also issued expert
7 reports and been deposed in this case; is that correct?

8 A. Yes, I have.

9 Q. And can you give us an idea of the type and
10 amount of information that you've reviewed in order to
11 form your opinions in this case?

12 A. I can. I think of it in a couple of different
13 ways.

14 First, back in my office, I think we have some
15 bankers boxes that have been floating around here in the
16 courtroom. I have about 13 or 14 of those. And then a
17 lot of the documents that I have are electronic.

18 I had somebody in my office perform just kind
19 of a calculation as to how many pages there are, and he
20 said 30,000.

21 Q. And what type of information did you review?
22 Dr. Becker explained the nature of the some of the
23 documents he looked at, didn't he?

24 A. Yes. I reviewed the financial data, licenses,
25 a bunch of deposition testimony, correspondence, and

1 information like that.

2 Q. And did you hear Dr. Becker testify when he
3 was on the stand the other day?

4 A. Yes, ma'am. Yes, ma'am, I heard him.

5 Q. Are there any points on which you actually
6 agree with Dr. Becker?

7 A. Well, we're required to make some of the same
8 assumptions, and so in that regard, I think that there
9 are some points.

10 Q. Now, Mr. Bakewell, you prepared some slides to
11 use today to help you illustrate your testimony; is that
12 right?

13 A. Yes. Yes, ma'am, I have.

14 Q. I'd like to pull up the first of those.

15 MS. CANDIDO: Ryan, could we have DX Demo
16 Slide 552, please?

17 Q. (By Ms. Candido) Mr. Bakewell, using this
18 slide, can you tell us the areas in which you and
19 Dr. Becker agree?

20 A. Yes, I can. This provides, I think, a good
21 summary.

22 First, as we discussed previously, we're both
23 -- Dr. Becker and I are both required to assume that the
24 '947 patent is valid, enforceable, and infringed. And
25 without this assumption, there's no damages.

1 We're both required to use the Georgia-Pacific
2 framework, and we both have.

3 And I've assumed a July -- July 2004
4 hypothetical negotiation date between Orion and Google.

5 Q. And that last bullet, that's the same date
6 that Dr. Becker assumed; is that correct?

7 A. Yes, ma'am.

8 Q. Now, I would like you to explain to the jury
9 some more significant disagreements that you have with
10 Dr. Becker's analysis.

11 And I think we have a slide on that as well.

12 A. Okay.

13 MS. CANDIDO: Ryan, if you could pull up
14 DX Demo Slide 553, please.

15 Q. (By Ms. Candido) So would you please explain
16 to the jury some of those more significant disagreements
17 that you have with Dr. Becker?

18 A. Yes, I can.

19 First, there is a transaction that occurred
20 some six months prior to the hypothetical negotiation
21 date where the '947 patent, along with 13 other patents,
22 was sold for \$1 million.

23 I don't believe it's appropriate for
24 Dr. Becker to ignore that transaction.

25 I didn't see anyplace where Google -- where

1 Dr. Becker utilized any of Google's patent agreements,
2 other than one, and that's the Stanford license, my last
3 bullet. And that one we're going to discuss some issues
4 with that. I don't think it's comparable at all.

5 Then I think that Dr. Becker missed some
6 pretty important business concepts, such as operating
7 freedom and the idea of royalty stacking, which I'll
8 explain.

9 Q. Is there one of these disagreements that's
10 more important than the others?

11 A. In my mind, there is, because Dr. Becker's
12 damages analysis is totally dependent on one license. I
13 think it's the last one. But I have it last, because
14 there's some other things that I think that we'll
15 discuss prior.

16 Q. But you believe that the Stanford license and
17 its treatment is your main point of disagreement --

18 A. Yes, ma'am.

19 Q. -- with Dr. Becker?

20 A. Yes, ma'am.

21 Q. Mr. Bakewell, you said that Dr. Becker ignored
22 Orion's purchase of the '947 patent and 13 other patents
23 for \$1 million in January of 2004; is that right?

24 A. Yes.

25 MS. CANDIDO: Ryan, could we see DX Demo

1 Slide 556, please?

2 Q. (By Ms. Candido) And were you referring to
3 this January 2004 patent purchase agreement between
4 Orion and Firepond?

5 A. Yes, ma'am. This is exactly it.

6 Q. Why was this purchase agreement relevant to
7 your analysis?

8 A. Well, it's not very often in a patent
9 infringement damages analysis that we have a data point
10 like this where an asset is sold just months before the
11 hypothetical negotiation is to occur.

12 I think it's true, really, in any intellectual
13 property valuation exercise.

14 And so when this type of data is available, I
15 think it's very, very important and critical, and it
16 provides important information as to the value of the
17 asset.

18 Q. So, specifically, what did this purchase
19 agreement tell you about the value of the '947 patent?

20 A. Well, since there were 13 other patents that
21 were sold along with the '947 patent, we can make an
22 assumption that all of the other patents are worth
23 nothing. And if we make that assumption, the most the
24 '947 patent can be worth is \$1 million.

25 So under that reasoning, the most that the

1 '947 patent can be worth is \$1 million.

2 Q. Mr. Bakewell, next on your list of
3 disagreements with Dr. Becker was that he disregarded
4 Google's real-world patent agreements.

5 What did you mean by that?

6 A. Well, there were a variety of licenses that
7 Google produced, 10 to 15 licenses. And we heard
8 Dr. Becker say that he didn't consider any of them as
9 appropriate for his analysis. And I disagree.

10 I think there are some attributes of many of
11 the licenses, and three of the licenses that are
12 actually licenses and purchase agreements that are very
13 important that make them comparable and informative of
14 the reasonable royalty in this case.

15 Q. Backing up one step, could you explain to the
16 jury what real-world Google license agreements you
17 reviewed or you started your review with?

18 A. Sure. So as I understand it, Google agreed to
19 produce its patent licenses that relate to search,
20 advertising, and e-mail. And so that's where I began my
21 analysis, was to review all of those licenses.

22 MS. CANDIDO: Ryan, would you please put
23 up DX Demo Slide 558?

24

25

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7 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

8 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

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16 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

17 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

18 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

19 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

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21 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

22 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

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24 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

25 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

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3 **REDACTED BY ORDER OF THE COURT** | [REDACTED]
4 [REDACTED] [REDACTED]

5 MS. CANDIDO: Ryan, would you please pull
6 up DX Demo Slide 560?

7 Q. (By Ms. Candido) Mr. Bakewell, would you
8 please explain the calculations that you performed on
9 this slide?

10 A. I have. In this slide, I'm comparing the
11 total royalties under the agreements that we just
12 covered, the three most comparable and then the other
13 agreements to Dr. Becker's 64-million-dollar, at least,
14 damages opinion.

15 And I counted the number of times larger
16 Dr. Becker's royalty opinion is than each of these
17 agreements. [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 Q. And just so we're clear, the licenses and the
24 agreements listed on this slide, many of them included
25 more than one patent; is that right?

1 A. That's right. One example is this Disney
2 agreement that included rights to 17 patents, not just
3 one.

4 Q. And you haven't made any adjustment for that
5 here in your calculation?

6 A. No, I haven't.

7 Q. So it's a very conservative approach?

8 A. In that way it is, yes.

9 MS. CANDIDO: Ryan, would you please pull
10 up DX Demo Slide 561?

11 Q. (By Ms. Candido) Mr. Bakewell, would you
12 please explain to the jury what this slide shows?

13 A. This slide shows Dr. Becker's damages opinion
14 in a graphical format as to how much larger it is than
15 each of the licenses that we saw before.

16 You can see that the axis actually in order to
17 make these agreements appear, I can only make it up to
18 \$30 million, and Dr. Becker's damages opinion, as you
19 know, goes well beyond that.

20 Q. Mr. Bakewell, you also mentioned in your
21 disagreements with Dr. Becker that operating freedom was
22 a concept that Dr. Becker had ignored.

23 What do you mean by that?

24 A. Well, I believe that we -- we have some
25 deposition testimony that explains that. I think that I

1 can also explain it as well.

2 Q. Well, if you could just explain --

3 A. Sure.

4 Q. -- first what operating freedom is.

5 A. So the concept of operating freedom is that
6 when a company, particularly in a field where products
7 change frequently -- we heard Mr. Huber and Mr. Furrow
8 speak yesterday or two days ago about how Google
9 develops its product and it changes them nearly every
10 day, if not more than that.

11 In a situation where products are changing all
12 the time, what a company -- its rational objective in
13 entering into a license agreement is getting as much
14 freedom to operate as it can.

15 So it wants to be able to either use or not
16 use the technology and not have to worry about it.

17 That's what's called in the industry freedom
18 to operate.

19 Q. Have you seen evidence in this case that
20 operating freedom is important to Google and its patent
21 licenses agreements?

22 A. Yes, I have.

23 Q. And did you rely on any deposition testimony
24 in that regard?

25 A. This is what I was referring to earlier.

1 Q. So this is Google's licensing witness, Jack
2 Ancone, again?

3 A. Again, this is Mr. Ancone, yes.

4 Q. And you had the portion highlighted that you
5 were interested in. Could you explain that to the jury,
6 please?

7 A. That's right.

8 He said two things. First, he considers and
9 Google considers every license on a case-by-case basis.
10 But what they have in the front of their mind is this
11 business subject of operating freedom. And in his
12 words, what he says is that they want the freedom to
13 either do what they're doing what they have, or what
14 they potentially would want to do in a particular space.

15 Q. And you've been in Court for a couple of days.
16 Have you heard any other testimony from witnesses that's
17 relevant to the operating freedom importance to Google?

18 A. Yes, ma'am.

19 Mr. Huber described how Google's business is
20 complicated and changes frequently and sort of puts that
21 quote into context.

22 And then I think that Mr. Furrow, who
23 testified after Mr. Huber, put kind of a practical tone
24 on that in terms of how often he's involved in making
25 changes to their products.

1 Q. Let's turn now to the Stanford agreement,
2 since that's your most important point of disagreement
3 with Dr. Becker.

4 A. Yes, ma'am.

5 Q. Do you recall that when Dr. Becker testified,
6 he discussed converting an equity grant in the Stanford
7 license into a running royalty rate?

8 A. He did.

9 Q. Do you agree with that conversion?

10 A. No, ma'am, I don't.

11 Q. Okay. Let's take a look at the actual
12 Stanford license.

13 MS. CANDIDO: Ryan, if you could bring up
14 DX Demo 174, please.

15 Q. (By Ms. Candido) Mr. Bakewell, do you
16 recognize this exhibit?

17 A. This is the Stanford license itself that's
18 been referred to fairly often, yes.

19 Q. Okay. Let's see what Google paid for the
20 rights that it got from Stanford.

21 MS. CANDIDO: Ryan, to do that, would you
22 please display Page 6 of the agreement and highlight
23 Section 8?

24 Q. (By Ms. Candido) Mr. Bakewell, referring to
25 this paragraph, would you please -- or this section,

1 would you please explain to the jury what Google was
2 paid for the rights -- excuse me -- what Google paid for
3 the rights that it got from Stanford?

4 A. Sure. And I think that we can walk through
5 this. It's pretty straightforward. It looks like a lot
6 of words, but the numbers just sort of -- I think we can
7 all follow them.

8 [REDACTED]
9 [REDACTED]

10 [REDACTED] **REDACTED BY ORDER OF THE COURT**

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24 [REDACTED]
25 [REDACTED]

1 [REDACTED] [REDACTED]
2 [REDACTED] [REDACTED]
3 [REDACTED] [REDACTED]
4 Q. Now, Dr. Becker valued the Stanford license
5 differently, right?
6 A. He did not value the Stanford license in the
7 way that it's laid out in this agreement, that's
8 correct.
9 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
10 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
11 Does the Stanford license itself contain any
12 running royalty rate provisions?
13 A. No, ma'am, it doesn't. These are the
14 royalty -- this is the royalty provision in the license
15 itself, and there are no running royalties.
16 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
17 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
18 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
19 [REDACTED] [REDACTED]
20 A. Well, this agreement was entered into in 1998,
21 and this was the value of the compensation that the
22 parties very clearly saw at that point in time, and it's
23 laid out in the license itself.
24 It's just like if you own a stock. I've owned
25 stock, and I remember in 2008, the value of my stock

1 went down. And the value of my stock was the value of
2 my stock on that specific day.

3 And that's a very important concept both in
4 business and valuation, as well as damages analysis.
5 The date of evaluation is critical for determining the
6 value of an asset.

7 Q. What's the appropriate date to use, with
8 respect to the Stanford agreement, for when to calculate
9 the value of that license to Stanford?

10 A. This was in December of 1998, if I'm not
11 mistaken.

12 [REDACTED]

13 [REDACTED]

14 [REDACTED] **REDACTED BY ORDER OF THE COURT**

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

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9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 Q. Now, again, just to be clear, did that other
17 litigation relate to the '947 patent that's at issue
18 here?

19 A. No, ma'am, it didn't.

20 Q. Was AdWords the accused product in that other
21 case?

22 A. I don't believe that it was.

23 Q. So putting aside you disagree with Dr. Becker
24 about the valuation of the Stanford license, do you
25 agree with Dr. Becker that the Stanford license is

1 comparable to the hypothetical negotiation between
2 Google and Orion?

3 A. No, ma'am. I think it's very different.

4 Q. Why?

5 A. Well, there's a few reasons.

6 First of all, the rights that were conveyed
7 under this agreement were much broader than what I call
8 a straight patent license.

9 It included rights to much more than just one
10 patent. I think that the technology even in that one
11 patent was different.

12 And I think that the date is an important
13 consideration as well, in that it was a different point
14 in Google's history.

15 Q. You mentioned that the Stanford license
16 conveys other technology other than the patent. I think
17 you have a slide on that, so --

18 A. I do. I think I actually had to use two
19 slides, if I recall correctly.

20 Q. Okay.

21 MS. CANDIDO: Ryan, would you please
22 bring up DX Demo 562.

23 Q. (By Ms. Candido) So this is an excerpt of a
24 page from that Stanford license agreement; is that
25 right?

1 A. That's right. These are lists in that
2 agreement. It's an appendix that's explicitly called
3 out as to the other rights that were licensed, and you
4 can see there's a variety of other rights: Dynamic Data
5 Mining, the PageRank Citation Ranking, the Google logo
6 and name, which I think is important as well, some other
7 technology and software.

8 Q. So is the second-to-last bullet and the one
9 above that talk about technology for scanning paper
10 materials, such as books, and indexing them and then a
11 clustering technology?

12 A. That's right.

13 Q. Google got all of those rights?

14 A. They did.

15 Q. The next slide that you have is DX Demo 563.
16 So this is the next page of the Stanford agreement; is
17 that right?

18 A. That's right. And it's continuing. There's
19 even more rights that were conveyed under this
20 agreement: Source code and then some implemented
21 features.

22 And then I think another important difference
23 in that -- in this agreement is that the patent
24 application that was conveyed, from that patent
25 application, six patents, I believe, eventually issued

1 from it. And one of them was the '999 patent that we've
2 heard people talk about.

3 Q. You prepared a slide comparing what Google got
4 in the Stanford license to what Google would get in the
5 hypothetical negotiation with Orion, correct?

6 A. I believe that I have, yes.

7 Q. Okay.

8 MS. CANDIDO: Ryan, would you please pull
9 up DX Demo 564.

10 Q. (By Ms. Candido) Would you please explain what
11 you've done in this slide?

12 A. Okay. Well, this slide compares what's
13 involved in a hypothetical negotiation that's setting on
14 this, I guess, disk on the left or a disk that was part
15 of a scale, a non-exclusive license to one patent, the
16 '947 patent, whereas in the Stanford-Google agreement,
17 which is here, there's the six patent applications.

18 And that's different in that it was an
19 exclusive license to the six other -- the patent
20 application that resulted in six patents.

21 And then I grouped these technologies into
22 various buckets: Ordering technology, clustering
23 technology; we saw the Google name and logo, as I'm
24 working up; we talked about scanning and indexing
25 technology, et cetera.

1 Q. You mentioned that Google got an exclusive
2 license in the Stanford agreement, but it would only get
3 a non-exclusive license in the hypothetical negotiation.

4 A. That's right.

5 Q. What impact would that have on your valuation?

6 A. Well, exclusive licenses -- because if you --
7 if you license something exclusively as a company, that
8 means you're the only company that can practice that
9 technology, and you can distinguish yourself in the
10 marketplace.

11 So an exclusive license to a patent or any
12 technology is more valuable than a non-exclusive
13 license.

14 Q. I believe Dr. Becker testified that he took
15 this disparity into account. Did he do that correctly
16 in your opinion?

17 A. Well, he said that he did, but he didn't make
18 any mathematical adjustments whatsoever in order to do
19 that. So, no, he didn't do that correctly, to answer
20 your question.

21 Q. So did the expert that -- the other Google
22 expert that Dr. Becker referred to, when he converted
23 the equity interest into a running royalty, did he make
24 any adjustments to reflect for the difference between
25 exclusive license and non-exclusive license?

1 A. He did. He made a very specific adjustment.
2 And he also said something else, but let me start with
3 the exclusive-to-non-exclusive adjustment.

4 He reduced the rate that he calculated from to
5 half of 1 percent to a quarter of 1 percent just for
6 that difference alone to say that: Look, an exclusive
7 license is going to be more valuable than a
8 non-exclusive license and I need to recognize that and
9 take the rate down by half.

10 Q. So you took the rate from .5 to .25 percent?

11 A. Just for the distinction between exclusivity
12 and non-exclusivity alone.

13 And then beyond that, he said explicitly that
14 there's other adjustments that would need to be made in
15 order to make any point of comparison in order to
16 account for these other things that are listed on this
17 side of the scale.

18 Q. But --

19 A. And he said that he did not make those
20 adjustments.

21 Q. But Dr. Becker's range includes the half a
22 percent, right? So it includes no adjustment at that
23 point?

24 A. It doesn't include any specific adjustment for
25 exclusivity. He didn't testify about any specific

1 adjustment that he made at all.

2 Q. Did you consider whether the patent
3 application licensed in the Stanford agreement was
4 comparable technology to the '947 patent?

5 A. Well, I did. I considered it. I relied upon
6 a couple of sources to make that determination, looking
7 at it from a commercial point of view.

8 Q. What was your determination about the
9 technical comparability or not?

10 A. Well, they're simply not comparable based upon
11 the technical evidence that I've seen from technical
12 experts and Google witnesses.

13 Q. How important was the Stanford patent to
14 Google's business from the evidence that you've seen?

15 A. They were very important. I think we heard
16 Mr. Huber testify about how, in 1998, when the business
17 was formed, this license was essentially at the very
18 core of the very beginning of Google. And, in fact, I
19 think he said that this was the fundamental technology
20 that Google was formed upon.

21 Q. Did you rely on any testimony from Mr. Ancone,
22 Google's licensing witness, about the importance of the
23 Stanford technology to Google?

24 A. I did. He was asked about that as well. He's
25 the licensing witness from Google again.

1 Q. And I'll just read that to save a moment here.

2 A. Okay.

3 Q. Page 86 of this transcript, Lines 20 to 24, he
4 testified: Yeah. It's the license of technology to
5 Google for the technology that Larry and Sergey invented
6 while they were at Stanford University, sort of a
7 foundational technology that the company was built on.
8 And then on Page 87, Lines 6 to 8, he continued: It's
9 my understanding that this technology is used in the
10 core of our business.

11 Do you recall that testimony?

12 A. I do recall that.

13 Q. You mentioned before, you also don't think the
14 date is comparable between the Stanford and the
15 hypothetical negotiation; is that right?

16 A. That's right. Just to back up one other
17 thing, I believe that Dr. Fox was asked, when he was on
18 the stand, about whether or not this patent was
19 comparable to the '947 patent, and he said no -- or the
20 patent rights that eventually became the '999 patent.
21 And to go to the date -- I think I talked a little bit
22 about that previously -- in 1998, Google was a very,
23 very different company than it was in July of 2004.
24 These rights were at the core of Google's business,
25 whereas the '947 patent was an incremental contribution

1 to Google by 2004 and an incremental contribution to a
2 business that had evolved into something that was very,
3 very sophisticated and well established.

4 Q. Okay. Did you review any of the licensing
5 agreements that Orion, the other party in the
6 hypothetical negotiation, entered into?

7 A. Yes, I did.

8 MS. CANDIDO: Ryan, could you display DX
9 Demo Slide 573, please -- I'm sorry -- 575.

10 Q. (By Ms. Candido) And just briefly, would you
11 describe what you've done in this chart, please.

12 A. Sure. Let me get rid of these things.

13 Okay. This lays out the compensation in the
14 settlement agreements of the -- of Orion and other
15 affiliated companies, I believe, that involved rights to
16 their '947 patent.

17 You can see it lays out the names of the
18 companies that were the licensees and the amount of the
19 lump-sum royalties that were included in the agreements,
20 and the highest was 5 million, and the lowest was
21 \$38,000.

22 MS. CANDIDO: So, Ryan, would you please
23 put up DX Demo 551.

24 Q. (By Ms. Candido) And just to summarize, it's
25 your opinion that a reasonable royalty is less than 2.5

1 million; is that correct?

2 A. That's right.

3 Q. And that's for the life of the patents?

4 A. Yes, ma'am, that's correct.

5 Q. And what did you base that opinion on, just to
6 summarize?

7 A. Well, to summarize, it was my review of the
8 Georgia-Pacific Factors. It's real-world evidence that
9 I reviewed, including actual licenses, a review of the
10 commercial considerations, and other financial analysis.

11 Q. All right.

12 MS. CANDIDO: Pass the witness.

13 THE COURT: Cross-examination.

14 MR. HUESTON: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. HUESTON:

17 Q. Good afternoon, Mr. Bakewell.

18 A. Good afternoon.

19 Q. Mr. Bakewell, let's turn for a moment to the
20 prior Firepond sale. It was a Mr. Croxall who sold the
21 '947 patent with some other patents, correct?

22 A. Yes.

23 Q. All right. Do you have any basis to believe
24 that Mr. Croxall knew, at the time he sold the Rice
25 patent, that Yahoo! was infringing the Rice patent?

1 A. Oh, no.

2 Q. And do you have any basis to believe that
3 Mr. Croxall knew that Yahoo! was infringing the Rice
4 patent at a rate of billions of searches a day?

5 A. No, I don't know. No.

6 Q. All right. You would agree with the general
7 principle that licenses entered into as settlements of
8 litigation are often less probative of a reasonable
9 royalty than non-settlement licenses, because they can
10 be influenced by factors other than subject technology,
11 correct?

12 A. Oh, yes, sir, absolutely.

13 Q. All right. Now, despite that, you did, in
14 fact, just show us a chart which had a list of
15 settlement agreements.

16 A. I did.

17 Q. And you actually put them all in a row from
18 low to high, right?

19 A. I did. That's right.

20 Q. And you created an average, right?

21 A. I believe that number was actually my damages
22 opinion --

23 Q. Okay.

24 A. -- the \$2-1/2 million.

25 Q. You would agree that trying to create some

1 sort of average of all those would be a bit like
2 throwing apples and oranges into a blender, correct?

3 A. No, I wouldn't agree with that analogy at all.

4 Q. Okay. Well, let's think -- let's look at that
5 a little bit.

6 One of the settlement agreements in that
7 chart, at the low end, was amazon.com.

8 You're familiar with that agreement,
9 right?

10 A. Yes, sir, I am.

11 Q. And you're aware that in that agreement, that
12 the dollar amount of consideration agreed to was
13 \$400,000. That was on your chart, correct?

14 A. That's right. It was for a part of Amazon's
15 business, and it was \$400,000.

16 Q. All right. And I'll be looking for just a yes
17 or a no to these.

18 And you recall, sir, do you not, that the
19 amount of infringing revenues, as stated in that
20 agreement, was \$4 million?

21 A. That's right. For that part of the business,
22 that's right.

23 Q. So the \$400,000 that was agreed to be paid was
24 10 percent of the \$4 million of infringing revenues.

25 You agree that that math is correct, yes?

1 A. Of those -- of those past revenues, that's
2 correct.

3 Q. All right.

4 A. That math is --

5 Q. And another --

6 A. -- the math.

7 Q. And another settlement agreement -- lawsuit
8 settlement agreement you considered was the eGain
9 lawsuit settlement between Orion and eGain, which called
10 for a 10-percent running royalty, correct?

11 A. That was on that list, that's correct.

12 Q. All right. Now, let's -- the total amount of
13 Google's accused revenues in this case is approximately
14 \$25 billion.

15 You understand that, right?

16 A. Yes, I do.

17 Q. And 10 percent of that amount would be
18 approximately \$2.5 billion.

19 Do you agree with that math?

20 A. That's the math, that's right.

21 Q. And you would also agree that that 10-percent
22 amount, 2.5 billion, is far higher than the
23 approximately 60 million to 120 million that Dr. Becker
24 has calculated as a reasonable royalty in this case.

25 A. Oh, of course it's higher.

1 Q. All right. And even if we cut that 10 percent
2 all the way down to 2 percent, trying to do my math
3 here, that's about \$500 million on the accused revenues,
4 right?

5 A. I think I follow your math. That's correct.

6 Q. All right. And that 500 million is still far
7 more than the amount that Dr. Becker --

8 A. Oh, sure, absolutely.

9 Q. All right. Has done in this case. Thank you.
10 Now, all other factors being equal,
11 Mr. Bakewell, you agree that the more a company uses an
12 invention, there is an upward increase in value,
13 correct?

14 A. That's right. If we set everything else aside
15 and just look at that, I would consider that to be true.

16 Q. All right. And for purposes of your
17 calculation of a reasonable royalty in this case, you
18 must assume that the Plaintiff is correct in asserting
19 that the invention is used in the serving of every
20 AdWords ad, correct?

21 A. I must assume infringement, that's correct.

22 Q. All right. That, in fact, Google is using the
23 invention every day, correct?

24 A. That's the assumption, that's correct.

25 Q. All right. And part of what you're trying to

1 do is to make a comparison with the infringement, as
2 accused, with other licenses in order to come up with a
3 good comparable license, right?

4 A. Well, there's a comparison, that's correct.

5 Q. All right. And you talked about the Invenda
6 licenses as being ones that you thought were more
7 comparable, correct?

8 A. Those were two of the three. One was a
9 purchase agreement, and one was a license.

10 Q. All right. And, in fact, one contained -- one
11 was called the Invenda-Google agreement and had two
12 patents, the '991 and '996, correct?

13 A. I think that was the license, if I recall
14 correctly.

15 Q. All right. And that license involved two
16 patents, the '991 and '996, correct?

17 A. That sounds familiar, yes.

18 Q. Okay. And you do not know Google's total
19 revenues from products practicing or using the '991
20 invention, correct?

21 A. That's correct. I would agree with that.

22 Q. And you do not know Google's total revenues
23 from products practicing or using the '996 invention, do
24 you?

25 A. I agree with that statement. What you said is

1 correct.

2 Q. And you do not know for certain, sitting here
3 today, whether Google has ever used the '991 or the '996
4 invention, correct?

5 A. I think that's true as well.

6 Q. All right. And unlike the assumption you must
7 make for the patent in this case, you do not know
8 whether every dollar of AdWords has been generated with
9 the aid and assistance of the Invenda patents, correct?

10 A. That's true.

11 Q. All right. Let's turn to the Meyer-Google
12 agreement.

13 Sir, you do not know if the Meyer patents are
14 used in every Google search, correct?

15 A. That's true.

16 Q. And you do not know whether Google practiced
17 the Meyer patent at the time it acquired them, correct?

18 A. I agree.

19 Q. And unlike what you must assume in your damage
20 analysis in this case, you do not know whether every
21 dollar of AdWords has been generated with the aid and
22 assistance of the Carl Meyer patents, correct?

23 A. I agree with that, yes.

24 Q. All right. I'd like to put up a list of the
25 comparable agreements that you mentioned.

1 A. Okay.

2 MR. HUESTON: If we could have that up.
3 And I think we have a copy of the slide. Ah, let me see
4 if I need to push the magic button.

5 COURTROOM DEPUTY: It's on.

6 MR. HUESTON: It is already switched.
7 Thank you very much.

8 Q. (By Mr. Hueston) And this is a list that you
9 prepared of what you felt were the comparable
10 agreements, correct?

11 A. I recognize that, yes.

12 Q. All right. For each one, can you tell the
13 jury exactly how much, if at all, Google was using the
14 patented invention at the time of the license?

15 A. Oh, not specifically. As I mentioned, what
16 they purchased with these licenses was the freedom to
17 operate and the freedom to not have to measure that, in
18 fact.

19 Q. Okay. So, sir, you cannot tell the jury how
20 much, if at all, Google was using the patented invention
21 at the time of license.

22 A. I agree. We discussed operating freedom, and
23 I agree.

24 Q. Let's go to the demonstrative.

25 So --

1 MR. HUESTON: Next slide.

2 Q. (By Mr. Hueston) And so I'm putting a no
3 there, and you do not know and can't tell the jury the
4 total amount of use by Google of these inventions listed
5 in these comparable licenses, right?

6 A. That's right. All I know is that Google --

7 THE COURT: Do you know or not?

8 A. That's right. I agree with him.

9 Q. (By Mr. Hueston) Thank you.

10 Now, you also presented the jury with a list
11 of items that you said were contained in the Stanford
12 agreement. You had a -- kind of a stack of boxes.

13 Do you remember that --

14 A. Yes.

15 Q. -- slide?

16 And you put the Rice invention as one little
17 box next to it, correct?

18 A. Yes.

19 Q. Now, each of those boxes, I noticed, were
20 exactly the same size, right?

21 A. That's -- that's correct, yes.

22 Q. All right. Now, that was about 10 boxes you
23 put there on the Google - Stanford-Google agreement,
24 right?

25 A. I agree. That sounds correct.

1 Q. All right. You did not attempt to value each
2 of the ten items to determine if they were as valuable
3 as the Rice invention --

4 A. No, sir.

5 Q. -- in this case --

6 A. No, sir.

7 Q. -- correct?

8 Sorry. Just for the record, if I could finish
9 my question.

10 A. I'm sorry. I thought you were finished.

11 Q. All right. And in fact, you knew, when you
12 made this chart and the calculations, assuming a 1/10
13 valuation, that they did not have equal value, correct?

14 A. They likely don't have equal value, that's
15 true.

16 Q. So you don't mean to tell this jury that your
17 math that you've come up with is based on an actual
18 assessment of value of each of those ten factors, right?

19 A. No. That slide is not to convey that the
20 value was equal, that's correct. I agree with you.

21 Q. Right. And that Stanford agreement had ten
22 items, one of which was the Google -- Google logo,
23 correct?

24 A. That's right.

25 Q. And this is back in 1998 when Google was still

1 coming out of its garage, right?

2 We've got a picture of the garage -- I think
3 you were here in opening statements -- that your counsel
4 showed.

5 A. I was. I remember, yes.

6 Q. And tell the jury how much the Google logo was
7 worth when those folks were sitting in their garage in
8 1998.

9 A. Well, I can't provide a specific valuation of
10 it --

11 Q. You don't know.

12 A. -- as I sit here today.

13 Q. You don't know.

14 A. No, I don't. That's correct.

15 Q. All right. Let's turn to a different topic.

16 Google, in fact -- let's strike that.

17 You are aware that Mr. Wagner, an expert hired
18 by Google in another patent litigation case, found that
19 it was acceptable to convert an equity interest into a
20 running royalty, correct?

21 A. That's right.

22 Q. All right. And like Dr. Becker in this
23 lawsuit, Mr. Wagner applied his conversion methodology
24 to the Stanford patent in that other case, correct?

25 A. That's right.

1 Q. All right. And you would agree that an expert
2 should not adopt or reject a finance theory depending on
3 which side hires him.

4 You agree with that, right?

5 A. That's true, absolutely.

6 Q. Okay. And you would also agree that an expert
7 should never use a flawed or erroneous finance theory
8 just to try to convince the jury that the other side is
9 wrong, right?

10 A. Oh, absolutely. I agree.

11 Q. Okay. All right. Let me ask you this: Sir,
12 you have testified as -- in, I think, three other trials
13 before this, correct?

14 A. That's true.

15 Q. And in one of those trials, you testified on
16 behalf of Plaintiff, and in that trial, you --

17 MR. HUESTON: I'm sorry.

18 THE COURT: Just a second.

19 MR. CANDIDO: Our objection is it's not
20 appropriate to be referring to other litigation.

21 THE COURT: Well, approach.

22 (Bench conference.)

23 THE COURT: What do you intend to ask?

24 MR. HUESTON: I'm going to ask him if he,
25 in fact, recommended a form of running royalty in one of

1 the trials that he did, and I'd like to ask, without
2 reference to the name of the case, the amount as well,
3 the amount in another plaintiff's trial, compared to
4 what he has done in one defense trial and this case.
5 It just goes to bias, Your Honor.

6 THE COURT: Okay. I'll allow that, and
7 you can address it on redirect, Ms. Candido.

8 (Bench conference concluded.)

9 Q. (By Mr. Hueston) Mr. Bakewell, in one of the
10 prior trials that you testified on behalf of plaintiff
11 for, you testified that a form of running royalty was
12 appropriate.

13 A. Yes. Yes, I did. That's right.

14 Q. Okay. And, in fact, that -- in that case, you
15 testified that a total amount of 140 to 180 or \$190
16 million was the range that would be appropriate in that
17 case, right?

18 A. That's right. That sounds about correct, yes.

19 Q. And in another case where you testified on
20 behalf of plaintiff, you testified that the amount of
21 money that would be appropriate to award the plaintiff
22 in that was on the order of 20 to \$25 million,
23 correctly --

24 A. Yes, sir.

25 Q. -- correct?

1 A. Yes, sir.

2 Q. Thank you.

3 You testified in one trial, before this one,
4 on behalf of defense, right?

5 A. Right.

6 Q. And in that case, you testified that the range
7 of appropriate damages in that case would be, low end 5
8 or 600,000, up to close to a million dollars, right?

9 A. That sounds about correct, yes, sir.

10 Q. And here, sir, in this trial, your fourth
11 trial, you're testifying on behalf of defense.

12 A. That's correct.

13 Q. And you're testifying that the range should be
14 somewhere of 1 to 2 million or so dollars, right?

15 A. 1 to 2.5 million, yes, sir.

16 Q. All right. Thank you.

17 MR. HUESTON: No more questions.

18 THE COURT: All right. Redirect?

19 REDIRECT EXAMINATION

20 BY MS. CANDIDO:

21 Q. Mr. Bakewell, Mr. Hueston was just asking you
22 about testimony that you've given in prior cases --

23 A. Yes.

24 Q. -- where you determined that a running royalty
25 was appropriate.

1 Were the circumstances of those cases
2 different than this case?

3 A. They were very different. The licenses in
4 that case that the parties produced and the practices
5 were of a running royalty in that matter.

6 Q. So in those prior times when you've opined
7 that a running royalty was appropriate, that was
8 consistent with the practices of the parties to the
9 hypothetical negotiation?

10 A. That was consistent with the practices of the
11 parties, that's correct.

12 Q. Mr. Hueston also asked you about your
13 knowledge of the revenue base with respect to Google's
14 license agreements or patent agreements.

15 Do you recall that?

16 A. Yes, I do.

17 Q. Does it concern you that you don't know
18 exactly how many dollars of AdWords' revenue was
19 associated with each of those licenses?

20 A. No, not at all. In fact, that's why I
21 discussed the concept of operating freedom. Google,
22 when it enters into license agreements, that's exactly
23 the right that it purchases, is to use the technology or
24 to not use the technology, so it doesn't have to track
25 its usage and can focus on developing new products.

1 Q. Is it unusual that a company wouldn't know
2 what the revenues are that are associated with every
3 patent that they license or own?

4 A. No, it's not unusual at all. It's normal
5 practice.

6 Q. Mr. Hueston also asked you whether you had any
7 knowledge about whether Orion knew about Google's
8 infringement in January of 2004 when it purchased the
9 patents from Firepond.

10 Do you recall that question?

11 A. That's right.

12 Q. Now, the hypothetical negotiation date in this
13 case is July of 2004, right?

14 A. That's right. It's six months afterwards.

15 Q. And that July 2004 date is supposed to be the
16 date that Plaintiffs contend Google first started to
17 infringe the patents; is that right?

18 A. That's correct.

19 Q. So do you understand his question about
20 whether Google's infringing in January of 2004?

21 A. It's a bit of an odd premise. I think I
22 understood the question, but it's not a premise if
23 accused infringement occurred after the date that the
24 patents were acquired.

25 Q. So by definition, what Plaintiffs are

1 contending, Google wasn't infringing in January of 2004.

2 A. I would agree with that, yes.

3 Q. Mr. Hueston also asked you about some of the
4 lump-sum settlement agreements that Orion had previously
5 entered into.

6 Do you recall that?

7 A. I do.

8 Q. And he derived some royalty rate based on the
9 lump-sum amount and stated amount of a previous use.

10 Do you recall that?

11 A. I recall those, yes.

12 Q. Is it appropriate to consider only the revenue
13 base that was previously at issue to calculate a running
14 royalty rate from those licenses?

15 A. No, sir, not -- or no, ma'am, not at all.
16 Those agreements were for -- they were for the lives of
17 the patents, and the revenues in those agreements were
18 historical revenues.

19 And so in order to do a calculation as
20 Mr. Hueston suggested, you need to include all of the
21 revenues, and that information simply is not provided in
22 the license.

23 It's clear that that rate, to the extent that
24 there is a running royalty rate that could be equated,
25 is going to be lower and could potentially be much, much

1 lower.

2 Q. Of all of the evidence discussed here today
3 that you've observed in Court, in your opinion as an
4 appraiser and certified licensing professional with over
5 20 years of business experience, what is the single most
6 relevant data point that the jury should consider in any
7 reasonable royalty analysis in this case?

8 A. It's any past transaction involving the
9 specific asset. So in this case, it's the sale in
10 January of 2001.

11 Q. And that's the sale for a million dollars for
12 14 patents?

13 A. \$1 million for 14 patents, that's correct.

14 Q. Have you seen any evidence in this case that
15 Google would have agreed, in the hypothetical
16 negotiation to pay Orion over 65 times as much money for
17 a license to the '947 patent as Orion had paid to buy
18 the '947 patent and 13 other patents only five months
19 earlier?

20 A. I've seen no evidence that would support that
21 at all.

22 Q. Have you seen any evidence in this case that
23 supports a royalty to Bright Response of 64 to \$128
24 million for a six-year license?

25 A. None.

1 Q. Have you seen any evidence in this case that a
2 license to the '947 patent is over 15 times more
3 valuable to Google than the \$3.55 million that Google
4 paid to purchase three advertising patents from Carl
5 Meyer?

6 A. No, ma'am, none.

7 Q. If all the accused Google products are found
8 to infringe Bright Response's patent and Bright
9 Response's patent is found to be valid, in your opinion,
10 what is the maximum reasonable royalty that the jury
11 should award?

12 A. \$2.5 million.

13 Q. Thank you.

14 THE COURT: Additional recross?

15 MR. HUESTON: No more questions, Your
16 Honor.

17 THE COURT: All right. You may step
18 down.

19 THE WITNESS: Thank you.

20 THE COURT: Who will be your next
21 witness?

22 MR. ROOKLIDGE: Yahoo! calls Mary
23 Woodford, Your Honor.

24 THE COURT: All right. Proceed.

25 MARY WOODFORD, DEFENDANTS' WITNESS, PREVIOUSLY SWORN

DIRECT EXAMINATION

BY MR. ROOKLIDGE:

Q. Good afternoon, Ms. Woodford.

A. Good afternoon.

Q. Now, we've been, at the beginning of each witness' testimony been, giving them an opportunity to identify themselves, tell us a little bit about themselves before they start.

But from your accent, I suggest that, even more so than me, you're not from around these parts. Why don't you tell us about yourself?

A. Well, my accent is somewhat described as the mid-Atlantic. My father was English. I'm an American citizen, but I was born in Germany and lived in Europe until I was 13; hence the accent.

Q. Okay. Why don't you tell us what you do for a living.

A. Well, I -- my current role is as a senior advisor with an economic consulting firm. I'm based in Washington, D.C. The firm is called Cornerstone Research. I'm currently the head of its intellectual property practice noted up here on the slide as IP, abbreviated.

I have been with the firm for eight years. I have been in the business of assessing damages in

1 complex commercial litigation for more than 21 years.

2 And before that, I worked in a corporate environment in
3 various financial functions for 10 years, both here in
4 the U.S., as well as overseas.

5 Q. And have you engaged in any practices relating
6 to patent damages besides your work at Cornerstone
7 Research?

8 A. I have written articles on -- on -- in patent
9 damages, as well as other intellectual property damages
10 and some licensing issues. I have given presentations
11 to business and legal audiences on those kind of
12 subjects.

13 I also had the privilege last year of
14 participating as a panel member on a project that was
15 trying to put together information for federal district
16 court judges on issues that arise in the trial of the
17 patent damages case.

18 Q. Are you a member of any professional
19 associations?

20 A. I am. I'm an associate member of the American
21 Bar Association, and particularly, the IP section.
22 I told Mr. Hueston at my deposition that I'm not sure
23 that I've renewed my membership, and we've been so busy
24 for the last two weeks that I still have to say with
25 that cautionary note, but it's certainly my intention,

1 if I haven't.

2 And I'm a member of the Licensing Executive
3 Society.

4 Q. And have you been engaged by Yahoo! to present
5 an infringement -- an opinion on damages in this case?

6 A. Yes, I have.

7 Q. And have you indeed formulated an opinion?

8 A. I have.

9 Q. Now, have you ever been qualified as an expert
10 witness in federal court before?

11 A. Yes, I have.

12 Q. And is that in patent damages cases?

13 A. In both patent damages and in other kinds of
14 commercial disputes, such as breach of contract.

15 MR. ROOKLIDGE: Your Honor, Yahoo!
16 proffers Mary Woodford as an expert on patent damages.

17 MR. HUESTON: No objection, Your Honor.

18 THE COURT: All right. We'll hear her
19 opinion.

20 Q. (By Mr. Rooklidge) Ms. Woodford, by expressing
21 an opinion on damages, are you meaning to suggest that
22 Yahoo! is somehow liable for patent infringement in this
23 case?

24 A. No, I'm not. Excuse me. As you heard
25 Mr. Bakewell say and as you heard Dr. Becker say

1 yesterday, all three of us have to make the same
2 assumption for the purpose of our analysis, which is
3 that there has been a finding of infringement and
4 validity with respect to the '947 patent.

5 That doesn't mean we believe it to be the
6 case; it just means that if that were not so, our
7 analysis would be beside the point. It's just a point
8 of departure.

9 Q. Are you going to be offering any opinions on
10 technical issues in this case?

11 A. No, not at all. To the extent that I sought
12 technical support in my work, I -- I had occasion to
13 consult with and read an expert report written by
14 Professor Allan, who spoke here this morning.

15 Q. Now, let's move into the substance of what
16 you're going to be talking about.

17 We've had some discussion of it already, but
18 from your perspective, could you tell us about what the
19 hypothetical negotiation is.

20 A. Well, you probably all know pretty much what
21 it is by now, but, in essence, Bright Response has
22 accused Yahoo! of infringing the '947 patent as of April
23 2004.

24 So my analysis goes to the question of, if
25 Yahoo! and Bright Response, actually, Orion, who owned

1 the patent at that time, had sat down around that date
2 or shortly before that date to negotiate terms of
3 compensation for a license to the rights -- for the
4 right to use that patent, the hypothetical negotiation
5 would form a construct for that situation.

6 Q. And we've heard some discussion with regard to
7 the Georgia-Pacific case and the Georgia-Pacific
8 Factors. Have you looked at those in this case?

9 A. I have. It's standard practice to look at
10 those factors in pretty much any assessment of a
11 reasonable royalty.

12 As you've heard others say, some are more
13 important than others in an individual case, but I have
14 looked at all of them.

15 Q. Now, have you condensed those factors down on
16 a slide that focuses on the most important ones for this
17 case?

18 A. I have, yes.

19 In particular, the ones that I think are
20 important is making sure that we give full consideration
21 to the available license agreements, both those for
22 Orion and other entities affiliated with the Plaintiff
23 that are -- and Bright Response.

24 Also, the value that Yahoo! has paid, not
25 charged, as a licensor, but for comparable licenses.

1 A key question here is also the apportionment
2 of revenue and also profit, which I should have put up
3 on the slide. That gets to the question of what exactly
4 does it benefit Yahoo! for the presumed use of the '947
5 patent.

6 In this case, as you heard Mr. Bakewell say a
7 moment ago, we also have a unique fact, which is we have
8 a real-world transaction, an arm's-length transaction,
9 to purchase the '947 patent, along with 13 other patents
10 and associated applications.

11 Q. Well, now, you mentioned apportionment of the
12 revenue. What -- what is the importance of that?

13 A. Well, the key question that we have to address
14 here is, what exactly is the value that the presumed use
15 of the '947 patent adds to Yahoo!'s Sponsored Search.

16 And in looking at that, you have to take into
17 account assets and abilities and capabilities that
18 Yahoo! also brings to the table, and also uniquely in
19 this situation, the admitted fact that the Sponsored
20 Search business was up and running and very successful
21 even before the alleged infringement began.

22 Q. Why don't we shift gears a little bit and talk
23 about Dr. Becker's analysis.

24 MR. ROOKLIDGE: If you would put up the
25 next slide.

1 Q. (By Mr. Rooklidge) Have you heard Dr. Becker's
2 testimony at trial here this week?

3 A. Yes, I have.

4 Q. Do you agree with his opinion?

5 A. I do not.

6 Q. And why don't you agree with his opinion?

7 A. Well, this slide summarizes a number of
8 high-level points of disagreement.

9 I disagree with Dr. Becker that there is any
10 justification for a running royalty rate based on
11 Yahoo!'s revenues.

12 Secondly, I think he came to a conclusion
13 about a specific royalty rate. I have seen no basis in
14 the evidence for the rate that he finally comes to.

15 As you heard him testify yesterday, and we'll
16 talk about it a little bit more, he has not done any
17 apportionment analysis in a way that I consider a true
18 reflection of the analysis that should be done.

19 We also, just as a point of reasonableness,
20 have the point of -- the framework that -- I'm sorry --
21 the data point of the purchase of the '947 patent, along
22 with other patents, just four months before the
23 hypothetical negotiation.

24 And then finally, there are a number of
25 previous licenses and other agreements that both Yahoo!

1 and the Plaintiff had entered into with respect to the
2 '947 patent on the Plaintiff's behalf, and he has paid
3 very little attention to those.

4 Q. Now, you mentioned this one factor here, far
5 out of balance with the purchase agreement. Is that the
6 Firepond purchase agreement that Mr. Bakewell discussed
7 in detail during his testimony?

8 A. Yes, it is. And as he mentioned, and you've
9 heard before anyway, the purchase of the '947 patent,
10 along with 13 other patents and associated applications
11 was for a million dollars.

12 I looked at that slightly differently than
13 Mr. Bakewell did. We have testimony in this case that
14 there was no independent valuation of how you would look
15 at each of those patents that are part of the portfolio
16 that Orion acquired.

17 So you can either look at it and say: Well,
18 the '947 patent was worth somewhere between zero and a
19 million, and for the sake of having some kind of
20 estimate and absent any other evidence to the contrary,
21 I just divided that million by the number of patents.
22 I could have divided it by a larger number because of
23 the -- because of the applications that were also
24 included, but if you divide by the number of patents,
25 you can estimate that there was a price paid of about

1 \$72,000 for the purchase of the '947 patent.

2 Q. Now, do you have an opinion regarding what
3 would be more reasonable data points?

4 MR. ROOKLIDGE: And let's move to the
5 next slide.

6 A. I do.

7 Given the paucity of sort of really good
8 economic analysis that was offered on behalf of the
9 Plaintiff, what I have -- what we have to look to here
10 is a substantial number of licensing and other
11 agreements that both parties have entered into in the
12 past.

13 And the ones that I'm focusing on,
14 particularly with Yahoo!, are paid in sort of similar
15 circumstances. And we're trying to look for comparable
16 bodies of intellectual property so that you're not
17 comparing an agreement that includes an entire patent
18 portfolio to the acquisition of a single -- a license of
19 a single patent.

20 And on the other side, I've looked at licenses
21 and -- as well as settlement agreements that Orion
22 entered into in connection with the '947 and other
23 patents.

24 Q. (By Mr. Rooklidge) Okay. Well, why don't we
25 drill down a little bit and look at your criticisms of

1 Dr. Becker's opinions in a little more detail.

2 MR. ROOKLIDGE: Let's go to the next
3 slide.

4 Q. (By Mr. Rooklidge) You said that Dr. Becker
5 failed to do what he should have done to justify the use
6 of a running royalty based on Sponsored Search revenue.
7 Can you explain that?

8 A. Yes.

9 As I understood Dr. Becker's analysis, he made
10 an operating assumption that somehow there was a
11 connection with the revenues of Sponsored Search and the
12 alleged infringement of the '947 patent.

13 I don't think you can actually, following
14 appropriate methodology, begin and end the analysis
15 there. What courts teach us is that you need to take
16 other economic indicators into account.

17 And what the particular question is, to what
18 extent does the use of the '947 patent drive demand for
19 Sponsored Search?

20 You heard Dr. Becker said that he had done no
21 analysis in that regard, and I certainly saw none. So I
22 would say there is no proof that the '947 patent drives
23 the demand for Sponsored Search.

24 Secondly, we've also heard that there is no
25 direct connection between the presumed infringement and

1 click. You actually -- the infringement stops, as you
2 heard Dr. Rhyne testify, before anybody clicks on an ad.

3 So while I don't dispute that the '947 patent,
4 we assume, is to some extent involved in Sponsored
5 Search, I have seen no proof that there is any
6 quantifiable effect on Sponsored Search revenue as a
7 result of the presumed infringement.

8 Given those two overriding criteria, I just
9 think it's bad methodology to base a running royalty on
10 Sponsored Search's revenues, as Dr. Becker has done.

11 MR. ROOKLIDGE: Let's go to the next
12 slide.

13 Q. (By Mr. Rooklidge) You said earlier that
14 Dr. Becker had no evidence for his quarter to a half
15 percent royalty rate as to Yahoo!.

16 Could you explain that?

17 A. Yes.

18 I think you asked Dr. Becker the question
19 directly yesterday, whether he did, and he said -- and I
20 would agree with him -- that there is no single license
21 agreement that we have in this case that relates to a
22 half -- to a quarter to a half a percent rate with
23 respect to Yahoo!.

24 The only thing that we have -- and he base --
25 he based his royalty rate from the starting point with a

1 very different group of license agreements,
2 specifically, those for the Overture patent portfolio
3 that you have heard about, but that is a very different
4 group of patents, and it has a much greater -- different
5 significance to Yahoo! than the '947 patent.

6 Q. In what way -- in what way is that a very
7 different group of patents, the Overture patent
8 portfolio?

9 A. Well, the Overture patent portfolio, as I
10 understand it, represents technology that is really
11 foundational to Yahoo!'s Sponsored Search business. It
12 has demo -- it has demonstrated its success in terms of
13 the -- associated with the bid auction process that goes
14 on for ads, at least in part. And that is something
15 that you heard Mr. Kolm talk about this morning, and
16 that has a direct connection to revenue.

17 Another reason why the Overture patent is --
18 patent portfolio licenses that Yahoo! has entered into
19 are not comparable in my view is they really represent
20 different kinds of transactions.

21 In the agreements that we have, Yahoo! was
22 licensing those patents to other entities, not sitting
23 at the table saying: I need to use these patents.
24 Yahoo! was already using and getting the benefit of
25 these patents.

1 So it's a different situation.

2 Q. So I just want to be very clear on that.

3 Is there any evidence in this case against
4 Yahoo! that Yahoo! would have agreed to or Orion would
5 have demanded from Yahoo! a rate of a quarter to a half
6 a percent of revenue?

7 A. I've seen none. I think the number is -- is
8 arbitrary and speculative.

9 We also have heard the -- played a little bit
10 of the deposition testimony of Mr. Yeh, who was talking
11 on behalf of Yahoo! with respect to its licensing
12 practices, and the -- the application of a quarter to a
13 half percent running royalty, or frankly, the
14 application of a running royalty goes against the body
15 of its licensing practices when it actually has taken
16 licenses to comparable technology.

17 MR. ROOKLIDGE: Move on to the next
18 slide.

19 Q. (By Mr. Rooklidge) You mentioned earlier that
20 Dr. Becker had not done the required apportionment.

21 Can you tell us more about that.

22 A. Well, it's not disputed in this trial that the
23 '947 patent is an improvement patent. It does certain
24 things. It combines certain steps that I won't -- I
25 won't define, because you've heard other people who have

1 more technical expertise explain them, but it's not a
2 new -- it's not a new invention, in terms of something
3 earth-shattering.

4 So when you have something like that, what you
5 really need to do is try to help answer the question:
6 What is it that the presumed use of this invention
7 actually adds by way of value to Yahoo!.

8 We know from -- from what we've heard, that
9 the Sponsored Search business was up and running before
10 April 2004, and it was not accused of infringement at
11 that time.

12 I have not -- I had not heard previously, and
13 I still haven't heard in this trial, and I've sat here
14 all week, some specific identification of something that
15 changed to turn that system from a non-infringing system
16 to an infringing system.

17 So I'm still waiting for an answer to exactly
18 what that specifically is.

19 The other thing that we need to recognize,
20 we've heard talk about another patent from Allen with
21 E-N, who is not professional Professor Allan, who spoke
22 to you this morning, but that is a -- that is a patent
23 that is considered and acknowledged as part of the prior
24 art that existed out there as the -- before the Patent
25 Office would be able to patent -- grant a patent to the

1 '947 patent.

2 So the question then becomes, well, what
3 exactly is different functionally and operationally
4 between the '947 patent and the Allen patent,
5 hypothetically, and the value that it imparts to
6 Yahoo!'s business? I haven't seen that.

7 The last item on the list is everything else
8 that Yahoo! brings to the table, and that includes
9 patents.

10 Professor Allan did some analysis at my
11 request and looked at at least 80-some-odd or close to
12 90 patents that Yahoo! has in the search and advertising
13 and related space.

14 That represents intellectual property rights
15 that are available to Yahoo! to deploy in the relevant
16 business.

17 It, obviously, has demonstrated success even
18 before the infringement began and continuing since.

19 And it has -- another thing that it has that
20 it brings to the table is, even if you assume that the
21 '947 patent is infringed in Yahoo!'s business, it has
22 nothing to do with providing the ads.

23 I mean, going out and managing the business,
24 finding the advertisers, making the contracts, making
25 all of the changes, and setting up all the dynamic

1 changes that you heard Mr. Kolm talk about this morning,
2 that is another very dramatic contribution that Yahoo!
3 makes to its business, separate and apart from the
4 presumed infringement.

5 Q. Ms. Woodford, let's skip ahead to Slide 9.
6 Is there anything that Dr. --

7 THE COURT: Excuse me just a second.
8 Mr. Rooklidge, we're going to take our afternoon recess
9 at this time. I've got a matter I need to tend to
10 downstairs.

11 Ladies and Gentlemen, be back ready to
12 start at 3:25. Remember my prior instructions. Don't
13 talk about the case.

14 LAW CLERK: All rise.

15 (Jury out.)

16 THE COURT: All right. The time before
17 this witness got on the stand, the Plaintiff had used 12
18 hours and 17 minutes, and the Defendant had used 11
19 hours and 41 minutes.

20 We'll pick up there after the recess.

21 (Recess.)

22 LAW CLERK: All rise.

23 (Jury in.)

24 THE COURT: Please be seated.

25 Mr. Rooklidge?

1 MR. ROOKLIDGE: Thank you, Your Honor.

2 THE COURT: Proceed.

3 Q. (By Mr. Rooklidge) Ms. Woodford, let's go to
4 Slide 10 here.

5 What does this slide show about the '947
6 license agreements that you looked at?

7 A. This chart represents a summary of the
8 lump-sum payments that Orion received when it entered
9 into settlement agreements with the entities listed
10 here.

11 And the reason it's titled 3-Patent '947
12 Agreements is that this group of agreements included not
13 only the '947 but two other patents. So what I've done
14 here, just to try to get a frame of reference, I
15 basically added up the total compensation here and come
16 up with an average per patent for each of the three
17 patents that is licensed in these agreements.

18 And I did that for the same reason I expressed
19 a moment ago. The range is anywhere between zero and
20 the full price of the patent, so this is a midpoint
21 estimate.

22 Q. And the average per patent number is?

23 A. Just -- \$64,556.

24 Q. Okay. Let's take a look at the next slide.

25 What does this slide show?

1 A. This is a similar analysis, but this group of
2 settlement agreements -- this actually includes the
3 purchase agreement from Firepond as well. But this
4 group of agreements includes not only the '947 patent
5 but 13 other patents. It also includes other
6 applications.

7 But for the purpose of the calculation, I just
8 tried to calculate the average price per patent that is
9 represented by the lump-sum payments in all of these
10 settlement agreements.

11 Q. And what was your conclusion as to the average
12 price per patent there?

13 A. In the -- in this case, it's \$122,582 per
14 patent.

15 Q. Okay. Let's go to the next slide then.
16 What does this slide show?

17 A. This slide basically summarizes the range of
18 information that I found among the agreements that we
19 have available, whether they be Yahoo! or -- or Orion or
20 Plaintiff agreements.

21 All of these were lump-sum agreements in one
22 form or another. And what I have arranged here is for
23 agreements that I think are comparable either in the
24 sense that they include the '947 patent, or in the case
25 of the VPS license, which is a Yahoo! license for the

1 Yahoo! -- there's three other single patent licenses
2 that I think are comparable.

3 I have basically arrayed the price of those
4 rights on the -- on the horizontal axis, and I've
5 actually compared that to the range of damages that
6 Mr. -- Dr. Becker is seeking, based on the running
7 royalty that he testified about.

8 Q. What has your analysis led you to conclude
9 about the dollar amount of Dr. Becker's so-called
10 reasonable royalty?

11 A. My conclusion is reasonable is not the right
12 way to describe it. There's nothing I've seen that
13 would basically magically take this patent from
14 something that's worth \$72,000 to 14 to \$27 million,
15 depending on which royalty rate you apply.

16 It also tells me that when you look at a range
17 of real-world licenses entered into either by Yahoo! or
18 the Plaintiffs, (a) they're all lump sums, and, (b), the
19 maximum lump-sum payment that I have available is an
20 average actually of \$590,000 per patent.

21 Q. And what was your final conclusion about
22 Dr. Becker's use of a running royalty rate-style
23 agreement instead of a lump-sum form of payment
24 agreement?

25 A. Well, it goes against the weight of the

1 evidence. Not only do the Plaintiffs license agreements
2 basically, with very few exceptions, represent lump-sum
3 payments. The relevant Yahoo! agreements similarly are
4 based on lump sums.

5 So the structure of the compensation is very
6 consistent, except for the running royalty that
7 Dr. Becker applied.

8 MR. ROOKLIDGE: Pass the witness.

9 THE COURT: Cross-examination.

10 MR. HUESTON: Yes, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. HUESTON:

13 Q. Ms. Woodford, good afternoon.

14 A. Good afternoon.

15 Q. Now, under the .25-percent and .5-percent
16 royalty proposed by Dr. Becker, how much would Yahoo!
17 pay on the day that Yahoo! and Orion reached a license
18 agreement?

19 A. I have not done that calculation.

20 Q. Well, under a running royalty, the date the
21 agreement would be reached, the answer I would suggest
22 would be 0, correct? There would be nothing to write a
23 check for?

24 A. On that very day, yes, perhaps not.

25 Q. All right. And you would agree that under Dr.

1 Becker's suggested royalty, I ask you, how much money
2 would Yahoo! have owed after one year, if Yahoo! had, in
3 fact, made zero dollars on Sponsored Search?

4 A. The answer would be zero.

5 Q. And what would be the answer if after five
6 years Yahoo! had made no money, what would be the
7 royalty?

8 A. If Yahoo! had no revenues for Sponsored
9 Search?

10 Q. Yes.

11 A. It would be zero.

12 Q. Now, you criticized Dr. Becker's analysis
13 for -- because he did not do any apportionment. Is that
14 your testimony?

15 A. It is my testimony, yes.

16 Q. Do you claim that he actually did no
17 apportionment analysis whatsoever?

18 A. I didn't see any in his report. There was
19 some recognition that there were contributions that
20 Yahoo! brings to the table, but I did not see -- and he
21 testified here and also at his deposition that he hadn't
22 done an apportionment analysis.

23 There were a line of questions from
24 Mr. Rooklidge.

25 Q. And you, Ms. Woodford, did not personally

1 examine prior art in your apportionment analysis,
2 correct?

3 A. No, I would not do that. I'm not a technical
4 expert.

5 Q. Is that a no, ma'am?

6 A. Yes, that's a no.

7 Q. Thank you.

8 In fact, you relied primarily on Dr. Allan for
9 the information for you to conclude about apportionment,
10 correct?

11 A. Do you mean with respect to the Allen
12 patent --

13 Q. Yes.

14 A. -- because I would say overall the answer is
15 no. With respect to the Allen patent, I just take note
16 what I learned from him about the Allen patent.

17 Q. And you were sitting here while Dr. Becker
18 testified, correct?

19 A. Yes, I was.

20 Q. And you recall, do you not, that he stated
21 that he relied on Dr. Rhyne in order to apportion or
22 weigh the various factors when it came to the technical
23 points of his analysis, correct?

24 A. I'm not sure that I remember his testimony
25 quite that precisely, but I do think it's fair to say

1 that he would rely on Dr. Rhyne to the extent that he
2 needed technical support.

3 Q. All right. Now, you have talked about the
4 Overture licenses. I want to ask you a couple of
5 questions about that.

6 You would agree that Mr. -- sorry -- that
7 Dr. Becker conceded that the '361 patent, the Overture
8 patent, was more important to Yahoo! than the Rice
9 patent, right?

10 A. He did concede that, yes.

11 Q. And, in fact, you would agree that
12 Dr. Becker's recommended royalty rate for the Rice
13 patent in this case is between one-tenth and
14 one-twentieth as much as the royalty rates, the running
15 royalty rates, charged by Yahoo! for their own Overture
16 licenses, correct?

17 A. For those portfolios, yes.

18 Q. So it's your testimony, Ms. Woodford, it's
19 fair for Yahoo! to get a running royalty with respect to
20 its licenses but not for Bright Response in this case?
21 Is that right?

22 A. My opinion doesn't go to fairness, sir. My
23 opinion goes to what is appropriate, given the
24 particular circumstances of the hypothetical
25 negotiation.

1 Q. Thank you.

2 MR. HUESTON: No more questions.

3 THE COURT: Additional questions,
4 Mr. Rooklidge?

5 MR. ROOKLIDGE: Just one, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. ROOKLIDGE:

8 Q. Ms. Woodford, in your understanding of the law
9 as a patent damages expert, which party bears the burden
10 on apportionment?

11 A. The Plaintiff does, and particularly with
12 respect to an improvement patent, such as the '947
13 patent, as I understand it.

14 MR. ROOKLIDGE: No further questions,
15 Your Honor.

16 THE COURT: Anything further?

17 MR. HUESTON: No, Your Honor.

18 THE COURT: All right. You may step
19 down.

20 Who will be your next witness?

21 MR. VERHOEVEN: Your Honor, Defendants
22 rest.

23 THE COURT: Yahoo! rests?

24 MR. ROOKLIDGE: Yahoo! rests, Your Honor.

25 THE COURT: All right. Counsel,

1 approach.

2 (Bench conference.)

3 MR. VERHOEVEN: We do have one issue,
4 Your Honor.

5 I've been informed that the Plaintiff
6 wants to call their damages expert again and
7 characterize it as rebuttal testimony.

8 THE COURT: Okay.

9 MR. VERHOEVEN: We would object to that,
10 Your Honor. They had the burden of proof. They were
11 able to cross-examine our folks. It's one thing for
12 Dr. Rhyne, when we had the burden on validity, to be
13 called again to rebut on the validity, which we were
14 expecting that they would do.

15 But we would -- we think it's
16 inappropriate to call a damages expert. He's just going
17 to rehash the same stuff. And just for the point of
18 having the last word, that's not appropriate rebuttal,
19 Your Honor.

20 MR. HUESTON: And, Your Honor, he's not
21 being called to rehash the points. Particularly,
22 Google's expert provided a new opinion that hasn't been
23 heard before, \$2 million, and in the process of that
24 laid out some criticism of Dr. Becker.

25 I think Dr. Becker has a right to say,

1 does that opinion from Ms. Woodford change your
2 calculations here. It's a very short answer to the new
3 information provided. It is not a rehash.

4 THE COURT: Well --

5 MR. VERHOEVEN: May I -- I'm sorry. May
6 I just respond briefly?

7 Our damages expert testified within the
8 scope of his Rule 26 report, and there was no objection
9 that he went outside of it. There's no surprise here.
10 It's simply they want to call on their expert to have
11 the last word.

12 THE COURT: Well, they've got the burden
13 of proof on damages. I'm going to allow them to do
14 it --

15 MR. HUESTON: Thank you, Your Honor.

16 THE COURT: -- for that limited purpose.

17 MR. HUESTON: Uh-huh.

18 MR. FENSTER: With respect to
19 infringement, we also have the burden, but I think it's
20 appropriate that we have the right to respond to Fox and
21 Allan.

22 THE COURT: I agree. Overruled.

23 MR. SPANGLER: Your Honor, do we have an
24 agreement or not with Cohen?

25 MR. VERHOEVEN: We do.

1 MR. SPANGLER: We do have agreement on
2 this evidence.

3 THE COURT: Okay. But Yahoo! expressly
4 keeps the Overture stuff confidential.

5 MS. DOAN: Wait on that one, Your Honor,
6 on the Overture licenses. Keep them under seal or
7 something.

8 MR. SPANGLER: Are we doing JMOLs after?

9 THE COURT: That's why I called you up
10 here.

11 Mr. Verhoeven.

12 MR. VERHOEVEN: Sorry, Your Honor.

13 THE COURT: I called you up here to make
14 sure it was okay that we defer any motions for judgments
15 as a matter of law until close of all the evidence after
16 I have dismissed the jury today.

17 MR. VERHOEVEN: Yes, Your Honor.

18 MR. ROOKLIDGE: That's fine with us, Your
19 Honor.

20 (Bench conference concluded.)

21 THE COURT: All right, Ladies and
22 Gentlemen, you heard now the evidence that the
23 Defendants have offered in their case-in-chief, and we
24 are now going to hear the Plaintiff's what's called or
25 referred to as the rebuttal case.

1 And so who will be your first rebuttal
2 witness?

3 MR. SPANGLER: Your Honor, we are going
4 to present Fred Cohen by deposition.

5 THE COURT: Okay. Are you going to read
6 both the questions and the answers?

7 MR. SPANGLER: Yes, Your Honor. It will
8 be very brief.

9 THE COURT: Introduce Mr. Cohen.

10 MR. SPANGLER: Mr. Cohen is one of the
11 listed inventors on the '947 patent.

12 (Deposition excerpt read.)

13 QUESTION: So let's talk a little bit
14 about that. So they brought you a draft of the
15 application and then what happened?

16 ANSWER: I read through the application
17 to see if it satisfied Chase's policies and practices,
18 and given my knowledge of Chase's operations to
19 determine whether or not it made appropriate claims,
20 given the little I knew from the face of the document
21 about the invention.

22 And I gave no legal advice in that
23 context, because I'm not a patent lawyer. I looked at
24 it. It looked fine to me, but I said, wouldn't it be
25 appropriate to add this aspect of the invention.

1 And the attorney said, yeah, that seems appropriate.

2 Now we have to make you an inventor.

3 QUESTION: When you say this aspect, what
4 aspect?

5 ANSWER: When the application came to me,
6 it contemplated an input to a process only of electronic
7 inquiries, e-mails, and other electronic inquiries.

8 Actually, I'm -- my memory is not
9 specific as to other electronic inquiries, something
10 that can't be e-mail inquiries.

11 And I said it shouldn't be limited to
12 e-mail inquiries, given what I know of technology now.

13 For example, dictation software, it ought
14 to be able to handle voice or voice recording just as
15 well as it does in e-mail or electronic transmission of
16 words. And they agreed and brought in the claims.

17 By the way, to my knowledge, I was a
18 listed inventor on the initial Chase application.

19 (End of deposition excerpt.)

20 THE COURT: Okay. All right. Who will
21 be your next witness?

22 MR. HUESTON: Thank you, Your Honor.
23 Bright Response calls Dr. Becker as its first witness in
24 rebuttal.

25 THE COURT: All right. Proceed.

1 MR. HUESTON: Thank you, Your Honor.

2 STEPHEN L. BECKER, Ph.D., PLAINTIFF'S WITNESS,

3 PREVIOUSLY SWORN

4 DIRECT EXAMINATION

5 BY MR. HUESTON:

6 Q. Dr. Becker, have you been here in the
7 courtroom to observe the testimony of Mr. Baker (sic)
8 and Ms. Woodford in their testimony about damages this
9 afternoon?

10 A. Yes.

11 Q. Has anything you heard today changed your
12 opinion?

13 A. No, it hasn't.

14 Q. Why not?

15 A. Well, I still believe that the approach that I
16 am recommending, both in terms of a running royalty and
17 the amount of that being a quarter to a half percent, is
18 a reasonable compensation for the use made of the
19 patent, if one assumes, as I must and as Mr. Bakewell
20 and Ms. Woodford must, that the patent is valid and
21 infringed.

22 Q. And, Dr. Becker, is there anything you heard
23 today that changes your opinion about the relevance of
24 extent of use?

25 A. Well, what I found notable in Ms. Woodford's

1 presentation and in Mr. Bakewell's presentation is that
2 the extent of use of the patent, the fact that we all
3 three have to assume that Yahoo! has over \$5 billion of
4 revenue, that must be assumed to be generated with the
5 contribution of the '947 patent, and over 25 billion for
6 Google, that that extent of use appears to be of no
7 importance to them.

8 It doesn't seem to enter into their analysis.
9 That their approach is disconnected from that extent of
10 use. And a running royalty, which I have used, hitches
11 that use to the -- to the royalty.

12 Q. Does it account for, your approach, extent of
13 use?

14 A. Yes, directly.

15 Q. You heard Ms. Woodford and Mr. Bakewell
16 testified that you ignored the Firepond sale of the Rice
17 patent to Orion, and that the sale was a significant
18 real-world agreement available for comparison in this
19 case.

20 Do you agree with that assessment of your
21 analysis?

22 A. I disagree with that.

23 Q. Why is that?

24 A. Well, they suggested that I ignored that
25 agreement, and I very much did not ignore it. I

1 absolutely understand that Orion purchased the '947
2 patent and 13 other patents for \$1 million.

3 But as I described in my direct testimony,
4 it's my opinion that to look at that transaction as
5 somehow limiting the value of the '947 patent in this
6 circumstance is like back to our oil-and-gas analogy of
7 you had bought a farm near Harrison County for a million
8 dollars, it would be like the oil company showing up and
9 saying, look, we've got a well on your property, but
10 we're going to cap the amount we're going to pay you at
11 a million dollars on your lease no matter how much gas
12 we produce, because you paid a million dollars for that
13 six months ago, nine months ago, some recent time
14 period.

15 And I just don't think that it's relevant, if
16 that prior transaction happened without the full
17 awareness of the existence and validity of that -- of
18 that patent, when the transaction occurred.

19 MR. HUESTON: Pass the witness.

20 THE COURT: Cross-examination?

21 MR. VERHOEVEN: Yes, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. VERHOEVEN:

24 Q. Good afternoon, Mr. Becker.

25 A. Good afternoon.

1 Q. Now, you testified about extent of use. You
2 have to assume 100 percent extent of use as part of the
3 hypothetical negotiation, right?

4 A. Yes.

5 Q. Okay. And in the real-world when you're
6 looking at real-world agreements like those many
7 agreements we looked at that involve the exact same
8 patent in this case, you're not required to assume 100
9 percent of use, are you, sir?

10 A. That's correct.

11 Q. So your argument that, well, here it's a
12 hundred percent of use, but in these things we don't
13 know if it's a hundred percent of use, you can make that
14 argument in every single damages case, can't you, sir?

15 A. Absolutely.

16 Q. Okay. Now, you said, well, you looked at the
17 Orion purchase. Let's just remember that was -- that
18 was a purchase just five months before the hypothetical
19 negotiation for my client, Google, right?

20 A. Yes.

21 Q. And that was for a million dollars, right?

22 A. Yes.

23 Q. It wasn't a non-exclusive license. It was for
24 the purchase of the whole patent, right?

25 A. Correct.

1 Q. And it wasn't just the '947 whole patent.

2 There were 13 other whole patents, right?

3 A. Correct.

4 Q. For a grand total of a million dollars, right?

5 A. That's right.

6 Q. Now, the damages amount -- the bottom range of
7 damages amount for Google that you're opining on is \$64
8 million, right?

9 A. That's right.

10 Q. And your testimony to this jury is that in a
11 hypothetical negotiation five months later,
12 circumstances may have changed so that there would be
13 more money that's appropriate; is that right?

14 A. Absolutely.

15 Q. Okay. Let's go back to my house example, all
16 right?

17 A. Okay.

18 Q. Say that you're looking for houses and there's
19 a house listed for \$64 million, and you saw that that
20 house was sold together with 13 other houses 5 months
21 earlier for \$1 million okay?

22 A. Okay.

23 Q. Can you explain to the jury what circumstances
24 would make you think that it's reasonable to pay \$64
25 million for one of those 13, 14 houses?

1 A. Absolutely I can.

2 Q. Okay. Do it.

3 A. If in that intervening five months, someone
4 had come along and validated the existence, for example,
5 of a major oil-and-gas play underneath those properties,
6 it absolutely could be reasonable that 13 houses selling
7 for \$1 million would be worth, after the validation of
8 that oil-and-gas play, \$64 million.

9 Q. Okay. And the five months between the time
10 that the Orion purchase occurred in the hypothetical
11 negotiation, what change in circumstances can you
12 identify, sir, that would change the valuation of the
13 '947 patent to one-fourteenth of a million dollars to
14 \$64 million?

15 A. I can identify the assumption that I have to
16 make and Ms. Woodford and Mr. Bakewell have to make that
17 the '947 patent has been validated, its enforceability
18 has been proved up, and that Yahoo! and Google are known
19 to be infringing.

20 Q. So you point to some legal assumptions.

21 What factual changes are you aware of
22 between -- during this five-month period, sir?

23 A. Well, there are none.

24 MR. VERHOEVEN: No further questions.

25 MR. ROOKLIDGE: No questions, Your Honor.

1 THE COURT: Any additional questions?

2 MR. HUESTON: Yes, very briefly.

3 REDIRECT EXAMINATION

4 BY MR. HUESTON:

5 Q. Dr. Becker, you just pointed to the real-world
6 agreements that Defendants put up for you.

7 Did you see with all their real-world
8 agreements any evidence of actual use of the -- of the
9 inventions in those -- by these two Defendants with
10 those real-world agreements?

11 A. No.

12 Q. In comparison, was there any evidence that you
13 found of use by Google and of Yahoo! of the licenses
14 that you used for purposes of your comparison to come up
15 with your .25- to .5-percent running royalty rate?

16 A. Yes. The '361 patent with respect to Yahoo, I
17 think there's been ample testimony that that is used by
18 Yahoo!.

19 And with respect to Google, the Stanford
20 agreement that I used, there's, I think, been ample
21 testimony and evidence that that patented technology is
22 used in every search by Google.

23 Q. Mr. Verhoeven, again, tried to use an analogy
24 of a sale for \$64 million.

25 Have you talked about a lump-sum payment or

1 check to be written for \$64 million in this case, or
2 have you talked about a quarter penny to a half penny
3 running royalty rate in this case?

4 A. It's the latter. It's my opinion that the
5 reasonable royalty should be a running royalty of a
6 quarter penny to a half penny. And through today, that
7 turns out to be 64 to \$128 million for Google, but
8 that's with the benefit of hindsight.

9 At the time, it would have just been an
10 agreement to pay that as time unfolded.

11 MR. HUESTON: Pass the witness.

12 THE COURT: Additional questions?

13 MR. VERHOEVEN: No, Your Honor.

14 MR. ROOKLIDGE: Just one question.

15 RECROSS-EXAMINATION

16 BY MR. ROOKLIDGE:

17 Q. You mentioned the '361 patent, correct?

18 A. Yes.

19 Q. That is part of the Overture portfolio,
20 correct?

21 A. Yes.

22 Q. And were you here in the courtroom when I
23 showed the stack of patents that were related to the
24 '361 patent as part of a related family?

25 MR. HUESTON: Objection. Objection. The

1 reference there, the predicate, none of that is in
2 evidence.

3 THE COURT: Overruled.

4 Q. (By Mr. Rooklidge) You were here when you saw
5 that big stack of patents that is the '361 patent
6 family, correct?

7 A. Yes.

8 Q. And you were here when I showed the other
9 stack of patents that's also part of the Overture U.S.
10 portfolio, correct?

11 A. Yes.

12 Q. And you were here when I pointed at that big
13 stack of patents on the floor that's the foreign
14 counterparts to the '361 Overture patents, correct?

15 A. Yes.

16 Q. The Overture patent portfolio, you admitted,
17 has many patents in it, correct?

18 A. Yes.

19 Q. Thank you.

20 MR. ROOKLIDGE: No further questions.

21 REDIRECT EXAMINATION

22 BY MR. HUESTON:

23 Q. Dr. Becker, did you take the stack into
24 consideration in coming up with one-tenth to
25 one-twentieth of the royalty rate they charge on those

1 licenses?

2 A. Yes.

3 MR. HUESTON: No more questions.

4 THE COURT: All right. No further
5 cross-examination?

6 MR. ROOKLIDGE: Nothing further, Your
7 Honor.

8 THE COURT: Google?

9 MR. VERHOEVEN: Nothing, Your Honor.

10 THE COURT: You may leave --

11 THE WITNESS: Thank you.

12 THE COURT: -- and step down.

13 All right. Who will be your next
14 rebuttal witness?

15 MR. FENSTER: Your Honor, Bright Response
16 would like to call Dr. Vernon Thomas Rhyne back to the
17 stand.

18 THE COURT: All right. Let's proceed.

19 VERNON THOMAS RHYNE, III, Ph.D., PLAINTIFF'S WITNESS,

20 PREVIOUSLY SWORN

21 DIRECT EXAMINATION

22 BY MR. FENSTER:

23 Q. Good afternoon, Dr. Rhyne.

24 A. Good afternoon.

25 Q. Dr. Rhyne, before we get started, as I was

1 listening to all the other witnesses, I don't think you
2 had a chance to tell how long you've been married.

3 A. Well, if my wife and I make it till the 4th of
4 June of next year, it will be 50 years. And my
5 daughter's already planning the celebration, so I hope
6 we do. We've got two kids and two grandkids.

7 Q. All right. So, Dr. Rhyne, have you been in
8 Court throughout the entire trial?

9 A. I missed a little bit of Dr. Becker's trial
10 (sic) when I went to the dentist, okay? But other than
11 that, I've been here all week.

12 Q. Okay. And did you see all the technical --
13 technical evidence that was put on in the Google case?

14 A. I did, every bit of it.

15 Q. And did you see all the technical evidence,
16 both fact witnesses and Dr. Allan, that was put on by
17 Yahoo!?

18 A. I did.

19 Q. Now, did any of the analysis or any of the
20 evidence that you saw in the trial over the course of
21 the last week change any of the opinions that you
22 developed?

23 A. No. And I was kind of gratified, because when
24 I work on a Plaintiff against companies like Yahoo! and
25 Google, I don't get to talk face-to-face with engineers

1 like Mr. Furrow or Mr. Kolm. I have to develop my
2 understanding of their systems by studying their
3 software and documents and listening to the depositions
4 of those gentlemen.

5 And I don't think I've heard anything said yet
6 that says I didn't get a good and proper understanding
7 of the two systems.

8 What I've heard is that maybe I don't
9 understand how those systems relate to the claims. But
10 as far as my technical understanding of AdWords and my
11 technical understanding of Sponsored Search that I seem
12 to have that pretty much on target.

13 Q. What do you mean that what you heard was --
14 that the arguments relate to the application -- your
15 application of the evidence to the claims?

16 A. Well, I guess what I've heard over and over
17 again, certainly from Dr. Fox and Dr. Allan, is that if
18 the claims mean what they say they mean -- I'm sorry --
19 if the claims mean what they say they mean, then they
20 don't think there's infringement.

21 But as I've told you and the jury several
22 times, I tried to follow the Court's constructions of
23 every single claim in great detail. And I've been
24 through every limitation on that basis. And I haven't
25 heard anything that changes my conviction that there's

1 infringement under the proper interpretation of each
2 limitation of each claim.

3 Q. Dr. Rhyne, I'd like to walk you -- not walk
4 you through -- ask you about some of the -- some of the
5 arguments in evidence that has been raised by the
6 Defendants in this case.

7 One of them deals with the interactivity.
8 Google and Yahoo! have said that they don't meet the
9 requirement of processing a non-interactive electronic
10 message, and both of -- or Google, at least, put up a
11 slide similar to this?

12 A. Yes.

13 Q. And they said that this was interactive and,
14 therefore, not non-interactive, right?

15 A. I -- I think -- that's the first time I had
16 seen it was in trial. I hadn't seen it in any prior
17 reports.

18 But this -- this feature is called Google
19 suggestions. And I think I told Mr. Verhoeven that I
20 don't have it on any of the computers that I use, and he
21 said, well, it's a default condition. I went back and
22 checked and sometime in the long distance past, I must
23 have turned that default off.

24 He's correct. It's the default position, but
25 I don't use it.

1 But if I understand it right, this is an
2 argument that when I type an M and I'm on my way -- I
3 think in this case it was to marinade -- that that M is
4 and of itself an interactive or some sort of
5 non-interactive electronic message sort of on the way to
6 marinade.

7 Q. So, Dr. Rhyne, does the fact -- and it is a
8 fact -- that Google will offer these suggests as you go
9 along, typing in the search box, did that affect any of
10 your analysis and tell us how?

11 A. Well, I went back and took a look at it. You
12 know, all the way through what I have accused of being a
13 non-interactive electronic message has been the query,
14 the thing that you do, that you type in.

15 To me, it wasn't an interactive message until
16 I got to M-A-R-I-N-A-D-E, and I either pushed enter on
17 the keyboard or I clicked on search.

18 MR. VERHOEVEN: Your Honor, I have an
19 objection. May I approach?

20 THE COURT: Yes.

21 (Bench conference.)

22 MR. VERHOEVEN: Your Honor, I don't see
23 how following up on my cross-examination is rebuttal.
24 He's not talking about what Dr. Fox said. It seems like
25 he's just getting another chance to try to fix what

1 happened on cross-examination.

2 THE COURT: Well, how is this rebuttal?

3 MR. FENSTER: Your Honor, this is -- all
4 of their witnesses talked about this interactivity.
5 Mr. Furrow and Dr. Fox talked about this being
6 interactive and, therefore, not non-interactive. And
7 that's what he's responding to.

8 MR. VERHOEVEN: Well, he's put up this --
9 I'm sorry, Your Honor.

10 THE COURT: Well, what I'm trying to tell
11 him is the witness rebuttal infringement and get to any
12 rebuttal you've got on validity, if you have any, okay?

13 I will let you give brief rebuttal, since
14 you've got the burden of proof, but we're not going to
15 go rehash the entire infringement theories, okay?

16 MR. FENSTER: Okay.

17 (Bench conference concluded.)

18 Q. (By Mr. Fenster) Dr. Rhyne, very briefly, you
19 said that you went and looked at Google search?

20 A. I looked at Goggle Suggest.

21 Q. And was this in response to evidence that you
22 saw in Goggle's case?

23 A. Yes, for the first time.

24 Q. Okay. And what did you find?

25 A. Well, I studied it. This is a page on the

1 Google website. I searched Google Suggest on Google.
2 And I think it's revealing in terms of what's actually
3 going on as that suggest takes place.

4 And if you start up there at the top right
5 there, it said -- okay -- as you typed in the search box
6 on Google web search, Google Suggests offered searches
7 by other users that are similar to the one you're
8 typing. Start to type New York or even just any W,
9 space, Y, and you'll be able to pick searches for New
10 York, New York City, New York Times, and New York
11 University.

12 So this document refers to the stuff that's
13 below those full query search terms as the search and
14 not to the N-E-W-Y as a search.

15 And if you go down further, there's a
16 paragraph that says: Get information fast. And then it
17 says: How Google Suggest works.

18 It says as you type -- incrementally, as you
19 type, Google Suggest returns search queries based on
20 other user's search activities.

21 So the point is that the stuff in the bottom
22 are the search queries, and if I like one of those
23 search queries, I can move my mouse down and click on
24 it. But they're referred to what's happening up in the
25 search box as this -- you're typing along, and those are

1 not the queries.

2 And so I think that Google themselves
3 recognizes that those are not incremental queries or
4 messages of any type.

5 Q. Just real briefly. Dr. Fox testified that the
6 M as you type along was an electronic message.

7 Do you agree with that?

8 A. It's a form of an electronic message, but it's
9 not the non-interactive electronic message that I've
10 accused of infringement. It's only that last message,
11 which is followed by a carriage return or a click on
12 Google Search.

13 It is the part I focused on for my
14 infringement analysis.

15 Q. Now, quickly, you heard from both Google and
16 Yahoo! that neither of them have a case-based knowledge
17 engine.

18 What's your response to the evidence as you
19 heard it?

20 A. Frankly, I don't understand it. I've relied
21 on the Court's construction, and I don't have it
22 memorized. But it basically says something to the
23 effect -- I realize time is short. I never used to like
24 to teach classes at 4:00 p.m. on Friday.

25 The -- it says you have a knowledge engine

1 that compares messages to the term -- the construct uses
2 exemplar cases. And I pointed out to the jury two
3 specific examples of comparisons to exemplar cases. One
4 of them was a comparison to the search terms entered by
5 the advertisers, and those are like -- those are, as I
6 said, searches that the advertisers hope somebody's
7 going to make a keyword, that -- whether it's pizza or
8 something. They're looking for that as an exemplary
9 case.

10 Q. Dr. Rhyne, focusing on the evidence that you
11 heard or the testimony that you heard from Mr. Furrow
12 and Dr. Fox, did you hear anything in either of those
13 witnesses that either confirmed or called into question
14 your conclusions?

15 A. They confirmed it. There were questions, I
16 think, of both Yahoo! and Google witnesses. Well, when
17 you get there and you make the comparison, do you
18 compare the keywords?

19 Yes.

20 Do you compare it to other attributes of the
21 advertisements in the message?

22 Yes, you do.

23 Q. Now, you heard from both Google and Yahoo!
24 witnesses that they testified that they all -- that
25 Google AdWords and Yahoo! Sponsored Search always

1 respond automatically.

2 A. Yes. In fact, they put up a quotation from
3 one of my -- I can't remember which testimony it was,
4 but they said -- I was asked that question, do they
5 always provide some kind of response, and I said you bet
6 they do.

7 Q. How does that impact your infringement
8 analysis with respect to the classification step?

9 A. Not at all. I think you actually had me point
10 to one of the early diagrams that had the search results
11 going up to the top and the ad results coming down here.
12 And the only part of either one of those systems that
13 I've accused of infringement has been the ad part,
14 AdWords and Sponsored Search.

15 I'm not saying that there's any infringement
16 as a result of sending back what they call the natural
17 search results. But there's no question -- in fact,
18 some of the exhibits that were shown by the Defendants
19 with their experts show the absence of advertisements.

20 There was one that Dr. Fox used where he had
21 misspelled cowboys. And if you look at that screen
22 shot, there are no ads, okay? I guess they didn't know
23 how an ad for C-O-W-B-O-I-S.

24 But that's the focus that I've been looking
25 at. What is the response? Is there an ad or is there

1 not?

2 Q. Dr. Rhyne, in summary without going through
3 all the -- all the elements and all the arguments, did
4 you see anything from the Google witnesses or Dr. Fox
5 that changed any of your opinions or confirmed any of
6 your opinions with respect to Google?

7 A. No.

8 Q. What is your opinion, after having seen all of
9 the evidence with respect to both Google and Yahoo!?

10 A. Bottom line, I still believe that Google
11 AdWords and Yahoo! Sponsored Search both infringe
12 Claims 30, 31, and 32 (sic) of the Rice patent.

13 Q. I think you said 32.

14 A. I'm sorry. 33.

15 Q. Now, Dr. Rhyne, let's move to invalidity.

16 Were you here for the testimony of Dr.
17 Branting?

18 A. Yes.

19 Q. And you heard the other -- the rest of Google
20 and Yahoo!'s invalidity case?

21 A. I have.

22 Q. Now, did anything in that presentation affect
23 your -- well, actually just tell me what's your response
24 to their case?

25 A. I think it actually confirmed it. I heard Dr.

1 Branting say that he was not familiar with
2 reexamination. I'm intimately familiar with
3 reexamination. I've been to the Patent Office three
4 times to testify as a technical expert before a
5 reexamination panel, which it consists of three senior
6 Patent Examiners selected to be part of the
7 reexamination team.

8 And in this case here, the reexaminer has said
9 that as far as the Allen patent alone, Claims 30, 31,
10 and 33 are valid over that reference.

11 MR. VERHOEVEN: Objection. Move to
12 strike. This witness is not classified as an expert in
13 PTO reviews.

14 THE COURT: Overruled.

15 Q. (By Mr. Fenster) Go ahead.

16 A. As far as the second request for
17 reexamination, which Yahoo! filed which, as I recall,
18 was the combination of the Allen patent and those CBR
19 manuals for that early rule-based --

20 MR. ROOKLIDGE: Same objection, Your
21 Honor.

22 THE COURT: Likewise overruled.

23 A. Okay. What the Patent Office did at that
24 point was said there's no substantial new question of
25 invalidity, and they didn't even accept the

1 reexamination request.

2 Q. Now, can you remind the jury what prior art
3 Dr. Branting relied on in one of his invalidity
4 conclusions with respect to the claims?

5 A. Okay. I think he relied on this Allen,
6 A-L-L-E-N, patent, Bradley Allen's patent independently,
7 and said that it anticipated or made obvious.

8 And then he also looked at the CBR -- there's
9 a user's manual in a separate document that's called the
10 Reference Guide. I may have those backwards, User's
11 Guide and Reference Manual, I believe.

12 Q. And did the Patent Office have a chance to
13 review those -- those references in determining --
14 confirming the validity of the asserted claims in the
15 case?

16 A. Well, it wasn't quite that direct. When
17 Yahoo! sent the documents in for the reexam, it's my
18 understanding that they sent in Allen and those CBR
19 manuals. And it's not that they -- I guess in a sense
20 they reconfirmed it. They just said that -- those prior
21 art references don't raise any question of invalidity.
22 It's just as valid as it was when we did the full reexam
23 the first time.

24 MR. VERHOEVEN: Same objection, Your
25 Honor.

1 THE COURT: Overruled.

2 Q. (By Mr. Fenster) Now, Dr. Rhyne, what
3 experience do you have with validity analysis and the
4 standards for validity?

5 A. I'm a patent agent. I took and passed the
6 patent bar exam.

7 Q. What does that mean?

8 A. Well, it's an exam the Patent Office now gives
9 once a year. I took it in 1999 and passed it the first
10 time. And a major feature of that examination is how do
11 I, as a patent agent, take a look at the possible prior
12 art that might be invalidating to a patent application
13 that I'm about to make.

14 And you also -- during the process, you have
15 dialogue with the Patent Examiner when he or she says,
16 look, have you thought about this? Have you thought
17 about that? Maybe you want to modify your claims.
18 I think I understand that very well as a result of my
19 patent agency.

20 Q. Okay. Now, did you just rely on
21 reexamination, or did you -- did you do your own
22 analysis with respect to the asserted prior art by the
23 Defendant?

24 A. No. I -- I wrote an extensive rebuttal report
25 to Mr. Branting -- excuse me -- Dr. Branting --

1 Mr. Branting's report alleging invalidity over Allen and
2 the CBR manuals. And I did a personal study of all of
3 the claim limitations against Allen, and I essentially
4 reconfirmed the difference that the reexaminer had made
5 for my own self, independent of the fact that it had
6 been through the reexam.

7 Q. And did you reach any conclusions as to
8 whether the Allen patent, the '664 patent, anticipates
9 any of the asserted claims, Claims 30, 31, or 33 of
10 the -- of the Rice patent?

11 A. Yes, I did.

12 Q. And what was that analysis?

13 A. It does not.

14 Q. And why is that?

15 A. Because if you look in the Rice patent --
16 excuse me -- the Allen patent, it does a sort at the
17 beginning of its analysis of the cases, and it selects a
18 set of cases based on that initial comparison between
19 the incoming case and the cases in the case base.

20 And when it passes that, it's called the
21 matching set, where it found its. When it passes that
22 set over, of all the things that it did the comparison
23 for in the first place, only some of those cases get
24 compared -- excuse me -- scored.

25 And if you recall, there's a claim

1 limitation -- I think it's 30(b6) -- that says, for each
2 case that's compared, you have to do a scoring. And
3 Allen absolutely does not do that.

4 Q. And if Allen doesn't meet one or more elements
5 of Claim 30, what does that mean with respect to whether
6 it anticipates Claims 30, 31, and 33?

7 A. Since 31 is dependent on Claim 30, if you miss
8 30(b6), you can't hit 31. And 33 depends on 31 and hits
9 30. So Allen doesn't anticipate any of the three.

10 Q. Okay. Did you analyze whether any other
11 references cited by Dr. Branting in his report
12 anticipate of the asserted claims?

13 A. Yes. I also looked at the CBR Manual and
14 Guide, considering them together, as if they were an
15 obviousness situation. And I went -- in my report, I
16 explained why.

17 They failed to score in the proper way. They
18 only scored the questions in a certain way and
19 separately scored the text of the case. And they do not
20 meet, again, 30(b6).

21 Q. Okay. Now, did you analyze the asserted
22 claim?

23 MR. FENSTER: Let me withdraw that.

24 Q. (By Mr. Fenster) Dr. Branting also asserted
25 that the -- that the asserted claims were invalid for

1 obviousness?

2 A. He did.

3 Q. What's obviousness?

4 A. Obviousness is a situation where you don't
5 have to have a single reference. And there are really
6 two kinds, but the kind that he looked at was
7 multi-reference obviousness.

8 And you just sort of combine the teachings of
9 the two references or three or four to see whether or
10 not that multiple set of references discloses each and
11 every limitation of a given claim.

12 Q. And did you analyze the asserted claims for
13 whether they were invalid for obviousness?

14 A. I -- I essentially -- again, I was responding
15 to what he said in his report. And so I went in and
16 took a look at the assertions he made.

17 And for each combination that he alleged
18 obviousness, I did my own independent analysis and found
19 at least one limitation of Claims 30, 31, and 33
20 missing, even in the combination of references that he
21 identified.

22 Q. Did you consider any other indicia or
23 considerations in doing your -- your obviousness --
24 obviousness analysis?

25 A. Yes, I did. I -- I looked into what are

1 commonly called the secondary indicia of
2 non-obviousness.

3 Q. What are those?

4 A. Well, it's -- it's -- it always reminds me --
5 it's kind of like those Georgia-Pacific Factors. There
6 was a case a number of years ago where somebody in a
7 court outlined -- there are things like recognition in
8 the industry. And I looked at that.

9 There are cases like failure of others to
10 accomplish, and I looked at that. I found that many
11 other people, while they were close to what was in the
12 Rice patent, had never quite hit that nail on the head.

13 I looked at things like success and -- because
14 I think that Google and Yahoo! both infringe the very
15 financial success that Google and Yahoo! have had using
16 that invention in their AdWords system and in their
17 Sponsored Search system, I think, can be credited back
18 to the usefulness of that invention.

19 Q. Now, Dr. Rhyne, did -- so can you give a
20 summary of what your opinion was with respect to whether
21 or not -- actually, before we get there, can you remind
22 the jury what your understanding is as to the burden of
23 proof that the Defendants have in proving invalidity?

24 A. You are going to have to correct me if I'm
25 wrong, but I believe theirs is clear and convincing as

1 opposed to, for infringement, it's preponderance --
2 preponderance of the evidence.

3 Q. And do you think they met that, that the
4 Defendants met that burden?

5 A. For invalidity?

6 Q. Yes.

7 A. Absolutely not.

8 Q. And what was your ultimate conclusion with
9 respect to the validity of the asserted claims?

10 A. For everything that was allegedly invalidating
11 of the Claims 30, 31, and 33 of the Rice patent, I don't
12 believe that that burden has been met. I don't think
13 those claims are invalid over that body of prior art.

14 MR. FENSTER: I'll pass the witness, Your
15 Honor.

16 THE COURT: All right. Mr. Verhoeven?

17 MR. VERHOEVEN: Thank you, Your Honor.

18 THE COURT: Cross-examination.

19 MR. VERHOEVEN: Thank, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. VERHOEVEN:

22 Q. Good afternoon, Dr. Rhyne.

23 A. Good afternoon, Mr. Verhoeven.

24 Q. You stated that when using that marmalade
25 example that you and I talked about on cross-examination

1 the last time --

2 A. Yes.

3 Q. You with me?

4 A. I'm familiar with it.

5 Q. I believe you said just now that when a user
6 types an M, that is a form of electronic message, right?

7 A. It is an http message that's sent in, that's
8 correct.

9 Q. So it's a form of electronic message, yes?

10 A. It is.

11 Q. That's yes?

12 A. Yes.

13 Q. Okay. And you agree with me that when a user
14 types that in, that gets sent from the source, which is
15 the human being, client computer and the browser, to
16 Yahoo!, right?

17 A. I think it does.

18 Q. And then automatically, almost immediately,
19 Google comes back with those ten suggestions, right?

20 A. That's true.

21 Q. And when the user types the next character, A,
22 that's a form of electronic message, sir, right?

23 A. Yes, it is.

24 Q. And that gets sent to Google, right?

25 A. Yes.

1 Q. And Google responds back, right?

2 A. That's correct.

3 Q. And so on and so forth, each character that
4 gets submitted, right?

5 A. It's very different at the end, but for each
6 character en route, there is a transmission, and it
7 comes back.

8 Q. And when the user -- say the user just wants
9 to type a search for marmalade. That's it.
10 You with me?

11 A. For marmalade.

12 Q. The word marmalade, correct?

13 A. Yes, sir.

14 Q. When the user finishes -- and the last letter
15 of marmalade is E; is that right?

16 A. Yes.

17 Q. Okay. So when a user finishes the E, that
18 goes to Google, the whole word goes to Google, doesn't
19 it, automatically, and Google responds automatically
20 with ten more suggestions, right?

21 A. That may be true.

22 Q. Okay.

23 A. At that point, as I say, I always hit enter or
24 search to indicate that the search is taking place.

25 Q. And that's the exact same query that gets sent

1 to Google if Google hits -- if the user hits search
2 after typing marmalade, right?

3 A. No.

4 Q. It's the same word.

5 A. It is. It's the same string of characters.

6 Q. It gets sent to Google.

7 A. I think it does.

8 Q. And Google comes back with an automatic
9 response.

10 A. Yeah. But it's not the same as the final
11 message that they send in with the carriage return or
12 the search.

13 Q. But the fact is, it's the same characters, and
14 it gets sent to Google, and Google comes back with a
15 response, right?

16 A. I think it does send back those --

17 Q. Is that yes --

18 A. Yes.

19 Q. -- or no?

20 A. I'll give you a yes.

21 Q. Okay. Thank you.

22 Now --

23 MR. VERHOEVEN: Your Honor, I forgot. I
24 need to approach the bench, and now is a good time since
25 I'm switching subjects.

1 THE COURT: Okay. All right.

2 (Bench conference.)

3 MR. VERHOEVEN: Really briefly, Your
4 Honor.

5 THE COURT: Well, just a second.

6 MR. VERHOEVEN: Okay.

7 THE COURT: Let everybody make it up
8 here.

9 Okay.

10 MR. VERHOEVEN: I wasn't aware that we
11 were permitted to talk about other lawsuits when I --
12 when we had that colloquy earlier today with the damages
13 expert.

14 I would like to be able, for bias
15 reasons, to question Dr. Rhyne about the fact that he
16 was adverse to Google in Function Media; he was adverse
17 to Google in PA Advisors; in this case; and also in
18 another case, PUM versus Google.

19 I think that's fair. If they're allowed
20 to talk about other damages cases where different
21 positions were taken, sauce for the goose, sauce for the
22 gander.

23 So I just want to clear it up, though.
24 I'm not going to do it if you don't want me to.

25 MR. FENSTER: We would -- I think that

1 his motion in limine says we can't talk about the
2 results of any of those cases.

3 THE COURT: Well, you're going to go into
4 the result, but I'll let you establish that this isn't
5 the only case he's been hired to testify against Google,
6 and you can tell the number -- ask him the number, but
7 don't get beyond that.

8 MR. VERHOEVEN: I can't tell which ones?
9 I shouldn't identify them?

10 THE COURT: I would rather you not
11 identify them.

12 MR. VERHOEVEN: Okay.

13 THE COURT: You don't need to identify
14 them, do you?

15 MR. VERHOEVEN: I guess I don't, but I
16 have one other query.

17 THE COURT: Okay.

18 MR. VERHOEVEN: Sorry about that.

19 Can I identify the subject matter of the
20 technology that's accused to show that it's similar?

21 THE COURT: Yes.

22 MR. VERHOEVEN: Thank you.

23 MR. ROOKLIDGE: Your Honor, just one more
24 question. It's a related question.

25 He -- I believe he opened the door by

1 talking about the commercial success of this. May I ask
2 him if the entirety of the revenues that Bright Response
3 has received from this patent have been through
4 settlement of litigation?

5 MR. FENSTER: I don't think he has any
6 foundation for that. I don't think he testified to
7 that.

8 THE COURT: Yes.

9 MR. ROOKLIDGE: Thank you.

10 (Bench conference concluded.)

11 Q. (By Mr. Verhoeven) Thanks for bearing with me,
12 Dr. Rhyne.

13 Let's switch to the issue of validity --

14 A. All right.

15 Q. -- okay?

16 First, I'd like to talk about the EZ Reader
17 system.

18 You familiar with that?

19 A. I have actually been, I thought, precluded
20 from talking about the EZ Reader system.

21 Q. Are you familiar with the EZ Reader system,
22 sir?

23 A. Yes.

24 Q. Okay.

25 MR. FENSTER: Objection, Your Honor,

1 beyond the scope.

2 THE COURT: It's overruled.

3 MR. FENSTER: He had the motion in limine
4 on this.

5 THE COURT: Well, overruled.

6 Q. (By Mr. Verhoeven) You don't dispute that
7 every element of the -- each of the asserted claims
8 existed in EZ Reader system, do you?

9 A. At trial, I haven't offered any opinion either
10 way.

11 Q. You don't dispute it, do you, sir?

12 A. Yes, sir.

13 Q. And, in fact, you would agree, wouldn't you,
14 sir, that the EZ Reader system does disclose every
15 element of the asserted claims of the '947 patent?

16 A. I have not done an analysis of EZ Reader
17 against every limitation of every claim, but I have no
18 basis to say that isn't true.

19 Q. Now, your deposition on validity was taken on
20 July 29th, 2010; is that right?

21 A. Yes.

22 Q. Let's see what you said when we asked you that
23 question at Page 93, Line 23.

24 THE COURT: Mr. Verhoeven, I think he
25 agreed with you.

1 MR. VERHOEVEN: Well, let me ask the
2 question again, Your Honor. Maybe I misheard. If I
3 may?

4 THE COURT: Okay.

5 Q. (By Mr. Verhoeven) Would you agree, sir, that
6 the EZ Reader does disclose every element of the
7 asserted claims of the '947 patent?

8 A. I have no basis to disagree with you. You can
9 read that as an agreement.

10 Q. So you do agree then; it does disclose it?

11 A. Okay.

12 MR. VERHOEVEN: Well, Your Honor, he --

13 THE COURT: Do you agree or --

14 THE WITNESS: Yes, as far as I know.

15 THE COURT: Okay. Let's move on.

16 MR. VERHOEVEN: Thank you, Your Honor.

17 Q. (By Mr. Verhoeven) Now let's talk about
18 case-based reasoning.

19 A. Yes, sir.

20 Q. Sometimes in the industry, it's called CBR,
21 right?

22 A. That's true.

23 Q. Okay. As of 1997, you wouldn't have
24 considered yourself an expert in case-based knowledge
25 engines, would you, sir?

1 A. I wouldn't have offered myself up as an expert
2 in a trial like this if it was pure case-based
3 reasoning, and I certainly wouldn't have done that in
4 1997.

5 Q. Would you agree with me that Dr. Branting has
6 more experience with case-based reasoning than you do,
7 sir?

8 A. Yes.

9 Q. Now, you talked about the reexamination --

10 A. Yes, sir.

11 Q. -- a little bit, sir.

12 Do you understand that in the reexamining
13 (sic) setting, the United States Patent & Trademark
14 Office does not address or assess whether a claim is
15 invalid based on prior public use?

16 A. Yes.

17 Q. That's not something they can even look at,
18 right?

19 A. Yes. You cannot bring that to them to
20 consider.

21 Q. So this issue in this case about the public
22 use with the EZ Reader, that couldn't have been
23 presented before the Patent Office. Would you agree
24 with me there?

25 A. That's my understanding.

1 Q. Okay. Now, one of the things you look at when
2 assessing obviousness -- I'm switching again to
3 obviousness, so you can keep up with me.

4 A. Okay. Thank you.

5 Q. So switching to that subject, one of the
6 factors that is relevant to look at is whether you can
7 point to any unpredictable results based on a
8 combination of elements that are known in the art,
9 right?

10 A. I'm not sure which way your question went.

11 Q. Okay. I'll try it again.

12 A. You sailed --

13 Q. Let me try --

14 A. I -- all right.

15 Q. -- to be more clear.

16 One of the factors that you could look at in
17 forming an obviousness analysis is whether you could
18 point to unpredictable results that were obtained as a
19 result of the patent, right?

20 A. Okay. I think I agree with you, but it's
21 actually a factor, as I understand that particular case,
22 that you point to as it not being obvious. And that's
23 what's giving me trouble.

24 Q. Exactly. So if there's un -- if there's -- if
25 there's unpredictable results, that tends to show it's

1 not obvious, right?

2 A. I think there's been a case where the Court
3 said, if you -- if you could point to unexpected or
4 unpredicted -- predictable results, then that indicates
5 that some combination is not so obvious.

6 Q. You can't point to any unpredictable results
7 of the claimed method of Claim 28, can you, sir?

8 A. I have not tried to do that.

9 Q. You don't have any opinion you can offer the
10 jury at this time on unpredictable results at all, do
11 you, sir?

12 A. I haven't yet, and I won't offer one now.

13 Q. Would you agree that before the priority date
14 of the '947 patent, that non-interactive electronic
15 messages existed?

16 A. Yes, I think that's the case.

17 Q. An e-mail certainly existed before the '947
18 patent, right?

19 A. I wish I could remember when I first started
20 using it, but it's been a long time ago. Before that.

21 Q. Probably in the '80s?

22 A. I bet I was using e-mail even well before
23 that.

24 Q. Okay. E-mail is a non-electric -- a
25 non-interactive electronic message?

1 A. It can be, depending, to some degree, on how
2 the -- on the system that receives it and processes it.

3 Q. There were e-mail systems way back when that
4 used non-interactive electronic messages, right?

5 A. There were e-mail systems that processed
6 e-mail in a non-interactive way.

7 Q. And would you agree with me, sir, that
8 rule-based knowledge engines existed before the '947
9 patent?

10 A. Yes, sir.

11 Q. And would you agree with me that case-based
12 knowledge engines existed before the '947 patent?

13 A. I would.

14 Q. And what about systems that combine both rule-
15 and case-based knowledge engines like in the '947
16 patent? Those were around in the prior art before the
17 '947 patent, right?

18 A. I have seen a couple of those, yes, sir.

19 Q. Okay. And what about these predetermined
20 responses that we've been talking about? Would you
21 agree that in the prior art, there were systems that
22 retrieved one or more predetermined responses?

23 A. Yes.

24 Q. '947 patent is not the first system to
25 retrieve one or more predetermined responses, is it,

1 sir?

2 A. I -- I have not contended that. I don't
3 believe that to be the case.

4 Q. And then if you're talking about Claim 31
5 where we talked about how, if there's a mismatch, it
6 decreases the score, and if there's a match, it
7 increases the score --

8 A. Yes.

9 Q. -- those notions of matching and increasing or
10 decreasing a score, those aren't new or inventive, are
11 they?

12 A. I think when I was asked about that in my
13 deposition, I said I didn't have any specific evidence,
14 but I couldn't -- I think I kind of gave you a
15 non-answer answer. I don't -- I don't know whether
16 there were systems like that before.

17 Q. You're not telling this jury that that is new
18 and unique, are you?

19 A. No. I'm telling them -- I'm not offering an
20 opinion on that topic.

21 Q. Okay. And then remember the normalization
22 step?

23 A. Yes.

24 Q. What claim was that; do you remember?

25 A. 33, I think.

1 Q. 33.

2 Normalization existed before the '947 patent,
3 didn't it?

4 A. Yes, sir. Percentages is a good example, like
5 batting averages.

6 Q. So you would agree that the '9 -- that this
7 Claim 33 --

8 A. I believe so.

9 Q. Okay. You would agree that Claim 33 of the
10 '947 patent doesn't disclose any new mathematical
11 formula for normalization, right?

12 A. Well, the claim just calls for it. Did you
13 mean to ask me about the claim or the specification?

14 Q. Well, I'm asking you, does Claim 33, the
15 new -- the added step in Claim 33, it talks about
16 normalization -- you remember that step?

17 A. Yes.

18 Q. That's not new or unique, is it, in isolation?

19 A. If you take that step out in isolation, I
20 don't believe that it is.

21 Q. Now let's put up --

22 (Pause in proceedings.)

23 MR. VERHOEVEN: Having the technical
24 difficulties, Your Honor.

25 Q. (By Mr. Verhoeven) This is the Allen patent up

1 on the slide. You see it at the top?

2 A. Yes.

3 Q. You've seen that before, right?

4 A. I have.

5 Q. And then at Column 10, Lines 40 through 44,
6 you see where I've pulled out some text?

7 A. Yes.

8 Q. And it says: A preferred example of
9 case-based reasoning system for providing user help on
10 call-in complaints is more fully described in, quote,
11 CBR Express user's guide, closed quote, available from
12 Inference Corporation in El Segundo, California, and
13 hereby incorporated by reference as fully set forth
14 herein.

15 You see that?

16 A. Yes, sir.

17 Q. You would agree with me, sir, wouldn't you,
18 that a person of ordinary skill in the art who's looking
19 at this patent, seeing this reference and incorporation
20 would be motivated to look at the CBR Express User's
21 Guide, together with the patent?

22 A. The version of the CBR User's Guide that was
23 available at that time, I agree with you completely.

24 Q. Okay. Now, Dr. Rhyne, this isn't the only
25 case where you've testified for a plaintiff against my

1 client, Google, is it, sir?

2 A. No.

3 Q. How many cases have you been retained on where
4 you've taken on an assignment to testify against my
5 client, Google?

6 A. Two others.

7 Q. You sure it's not more than that?

8 A. There may be more. I don't recall them.

9 MR. VERHOEVEN: Your Honor, may I
10 approach really briefly?

11 THE COURT: Well, yes.

12 (Bench conference.)

13 MR. VERHOEVEN: He's got the -- I wasn't
14 going to name names, but he's got the number wrong, and
15 I don't want to do it without permission. And I'll do
16 whatever you say.

17 THE COURT: Remind him of the names.

18 MR. VERHOEVEN: Thank you.

19 THE COURT: And, Counsel, don't refer to
20 whether or not they're represented by any of the same
21 counsel that are involved in this case, okay?

22 MR. VERHOEVEN: Understood.

23 (Bench conference concluded.)

24 Q. (By Mr. Verhoeven) Let me see if I can refresh
25 your recollection.

1 A. Sure. Obviously, I must not be remembering
2 one or so.

3 Q. There's a case called Function Media versus
4 Google. Do you remember that case?

5 A. Yes. That's one of the two I recall.

6 Q. And you testified against my client, Google,
7 in that case?

8 A. Yes, I did.

9 Q. And that case involved search technology?

10 A. I --

11 Q. Let me ask you a different question.

12 A. I -- I don't think it did.

13 Q. Did that case involve AdSense for Content?

14 A. Yes, it did that.

15 Q. And that's advertising on the internet, right?

16 A. Yes.

17 Q. And have you ever heard of a case called PA
18 Advisors versus Google?

19 A. Yes. That's the second case that I remember.

20 Q. And that's another case where you testified
21 against my client, Google?

22 A. I testified at deposition. Interestingly
23 enough that there was no infringement.

24 Q. Well, you don't need to talk about the result
25 in that case.

1 A. Okay. Sorry.

2 Q. We're not going to talk about results in any
3 of these cases.

4 A. Okay.

5 Q. But in that case, you testified against my
6 client, Google, as well, right?

7 A. In deposition. There was no trial.

8 Q. And what technology was involved in that
9 trial?

10 A. Some kind of search tech -- I think it was
11 just the pure search, not advertisement search, as I
12 recall.

13 Q. These two cases I just mentioned were patent
14 cases?

15 A. Yes, they were.

16 Q. Okay. And have you heard of a case called PUM
17 versus Google?

18 A. Yes. The reason I didn't list it is I'm
19 not -- I was not aware that my participation in that --
20 my agreement to participate as an expert in that court
21 has been made public.

22 Q. Oh, you didn't know we knew about it.

23 A. I had no -- I did not know. I always am very
24 careful about when somebody asks me to be one of their
25 experts until they have formally announced it, but fine,

1 yes, sir.

2 Q. That's another case where you've agreed to
3 testify against my client, Google, right?

4 A. To this point, I've agreed to do that.

5 Q. That's another patent case?

6 A. Yes, it is.

7 Q. And then there's this case, right?

8 A. Well, I didn't -- when you say what other
9 cases, I didn't count this one, but yeah.

10 Q. So we've got four --

11 A. Yes, sir.

12 Q. -- is that right, sir?

13 A. I believe that's correct.

14 MR. VERHOEVEN: No further questions,
15 Your Honor.

16 THE COURT: Mr. Rooklidge?

17 CROSS-EXAMINATION

18 BY MR. ROOKLIDGE:

19 Q. Good afternoon, Dr. Rhyne.

20 A. Good afternoon.

21 Q. Following up on that last point, this isn't
22 your first rodeo against Yahoo!, is it?

23 A. I think I've had one other case against Yahoo!
24 that actually went that far. It was that nXn case. You
25 were Defendants as well.

1 Q. Now, in your testimony, you linked the success
2 of Google's AdWords and Yahoo!'s Sponsored Search to the
3 use of the '947 patent.

4 Do you remember that?

5 A. Yes.

6 Q. Now, those services were very successful
7 before the alleged date of first infringement in this
8 case; isn't that correct?

9 A. I'm not sure about the very, but I'm aware
10 that both Google and Yahoo! were making money with the
11 preceding systems before they implemented those other
12 systems.

13 Q. In fact, Google at that time was the No. 1
14 rated search engine and Yahoo! was the No. 2 rated
15 search engine, wasn't it?

16 A. Well, but that's search. They were -- people
17 doing search, just to find search results, that's true.

18 Q. Okay. Now, you spoke about commercial
19 success. You're aware that the only revenue received by
20 Bright Response under the '947 patent is for settlement
21 of litigation, correct?

22 A. I'm not.

23 Q. Now, you were here today for Dave Kolm's
24 testimony that Yahoo!'s Sponsored Search always returns
25 a response.

1 Did you hear that?

2 A. Yes.

3 Q. Okay. Now, is it your testimony that Yahoo!'s
4 Sponsored Search does not always provide a response to a
5 search request?

6 A. No. They just -- well, again, I won't go
7 further.

8 Q. Now, you were testifying about interactivity,
9 and you said M is a form of electronic message.

10 A. It -- it -- yeah. It's sent back to Google.
11 In a way, it is.

12 Q. Now, you heard Fred Cohen's testimony being
13 read this afternoon, didn't you, where he testified that
14 he got to look at the patent application that had been
15 put together by the other four inventors, and they had
16 only mentioned e-mail, but he decided it would be best
17 to broaden that out to talk about voice data and
18 telephone codes, right?

19 A. I heard it read. I, frankly, didn't
20 comprehend a lot of what was read.

21 Q. Now, you've also heard here from the inventor,
22 Amy Rice, that non-interactive electronic message can
23 include TV broadcasts. We've heard about satellite
24 communications. We've heard about Morse Code in this
25 trial.

1 A. I don't recall all -- I remember hearing
2 somebody say something about television. I don't
3 remember Morse Code.

4 Q. At the time -- at the time of this claimed
5 invention, the http format was known, wasn't it?

6 A. Yes, it was. I think it's evolved, but there
7 was a version of http as a standard known at that time.

8 Q. Okay. And the inventors didn't mention http
9 messages in the patent, did they?

10 A. Not specifically.

11 Q. They could have mentioned http in the patent,
12 couldn't they?

13 A. I know of nothing that prevented them from
14 doing that.

15 Q. Do you know of any reason why they elected not
16 to mention http messages in the specification?

17 A. I don't know what was in their heads, but they
18 definitely mentioned communication over the internet,
19 and that's the venue in which http was being utilized.

20 Q. You testified about the reexamination that
21 Yahoo! filed.

22 Do you remember -- do you recall that?

23 A. Yes, I do.

24 Q. Now, you mentioned that they filed that
25 reexamination as to Claims 31 and 33, correct?

1 A. Frankly, I had forgotten that, but now that
2 you say that, that refreshes my memory.

3 Q. And Claim 30, which up until the point they
4 filed that reexamination, had been rejected by the U.S.
5 PTO, correct?

6 A. I think during the give and take with the
7 reexamination panel, initially, that claim was rejected.

8 Q. Right. And it was -- it was subsequently
9 indicated as being allowed after Yahoo! filed its
10 reexamination request on Claims 31 and 33, correct?

11 A. I don't know what the relative timing between
12 those two decisions was.

13 Q. And the U.S. PTO rejected Yahoo!'s
14 reexamination request for procedural reasons, because
15 there was a missing link between Claim 28, which it had
16 rejected for anticipation under the Allen patent, and
17 Claim 31, the first claim of the reexam, because it had
18 just recently allowed Claim 30, correct?

19 A. I understand exactly what you're saying, and
20 that -- that -- that's probably true. I don't think
21 you're telling us something that's not correct. But all
22 I remember, I think, is seeing the
23 no-substantial-question-of-invalidity statement.

24 Q. No substantial question of patentability.

25 A. Yes, sir. I knew I wasn't quite saying it

1 right.

2 Q. Okay.

3 A. That's -- I think that's in the rejection of
4 the reexamination request.

5 Q. Right. And as we stand here today, Claims 26
6 and 28 stand rejected by the United States Patent &
7 Trademark Office over the Allen patent for anticipation,
8 correct?

9 A. Yes.

10 Q. All right. Now, let's go back to secondary
11 considerations for a second.

12 You mentioned awards, didn't you?

13 A. Yes.

14 Q. And you're aware that Amy Rice received the
15 AAAI award for the article that she presented on the EZ
16 Reader at that conference, correct?

17 A. Yes.

18 Q. All right. And are you aware that Ms. Rice
19 testified that the abstract of that article was added to
20 the paper in April of 1996?

21 A. I don't recall that.

22 Q. Well, let's take a look, if we could. Let's
23 switch to the document camera.

24 MR. FENSTER: Object, Your Honor.

25 THE COURT: Sustained. Counsel,

1 approach.

2 (Bench conference.)

3 THE COURT: I had precluded him from
4 going into any discussion of public use. I allowed
5 Mr. Verhoeven to elicit questions concerning whether the
6 EZ Reader system met all the limitations of the claim,
7 but, Mr. Rooklidge, it's not fair, after I have excluded
8 his giving opinions on whether it's public use or not,
9 to then go and get what you want out of him, okay?

10 Just move on to something else.

11 (Bench conference concluded.)

12 MR. ROOKLIDGE: Thank you, Dr. Rhyne. No
13 further questions.

14 THE WITNESS: Thank you, Mr. Rooklidge.

15 REDIRECT EXAMINATION

16 BY MR. FENSTER:

17 Q. I have just a few brief questions.

18 First, with respect to the questions that
19 Mr. Verhoeven was asking you about as the user is typing
20 in -- I think his example was marmalade -- I think it
21 was marinade before, whatever -- as he's typing in
22 marinade, at what point does it become an electronic
23 message or a non-interactive electronic message as used
24 in the claims?

25 A. I think at the very end. It's a message

1 that's interpreted for the purpose of extracting a
2 predetermined response to return, and it's certainly
3 been the query that I have focused on, which comes at
4 the end of that sequence of M, M-A, M-A-R, et cetera.

5 Q. What do you mean by the end? What happens at
6 that time end?

7 A. I click on enter, or I click on Google search,
8 and as a result, that http message that I have showed at
9 the very beginning of my discussion is created,
10 packaged, and sent back in order to be matched against
11 advertisements.

12 Q. Now, Dr. Rhyne, Mr. Rooklidge was asking you
13 some questions about the disclosures with respect to
14 e-mail in the patent.

15 A. Okay.

16 Q. Okay. Can you see this?

17 A. Yes.

18 MR. VERHOEVEN: Is it okay if I move,
19 Your Honor?

20 THE COURT: Yes, of course.

21 MR. SPANGLER: I can move.

22 Q. (By Mr. Fenster) Can you read this okay,
23 Dr. Rhyne?

24 A. Depending on which part of it. A little bit
25 further to my left.

1 Q. Sure.

2 A. Okay. That's fine.

3 Q. About right there?

4 A. Uh-huh.

5 Q. Okay. What did the patent disclose with
6 respect to whether the electronic message was limited to
7 e-mail?

8 A. In several places, not just here, it made it
9 very clear that the patent covers as its -- electronic
10 message is far more than e-mail. It said here that it's
11 preferred that they are e-mail at the first paragraph,
12 but other types of electronic messages are contemplated
13 as being within the scope of the invention.

14 And then later it referred to preferably --
15 preferably an e-mail message. But it says the invention
16 is not so limited.

17 Q. Okay. And based on these disclosures,
18 Dr. Rhyne, do you have an opinion as to whether one of
19 skill in the art would understand the scope of the
20 patent to be limited to e-mail?

21 A. Oh, absolutely not.

22 Q. And just for the -- for the jury, so they can
23 go back and find this later, can you tell them where in
24 the patent they can find these disclosures?

25 A. Sure. The first one was taken from Column 4,

1 Lines 10 through 13.

2 The second one is over at Column 11 very near
3 the end of the patent at Lines 29 through 34.

4 Q. Now, Dr. Rhyne, Mr. Rooklidge suggested
5 correctly that at one point in the reexamination, the --
6 that Claim 30 did stand rejected.

7 A. Yes.

8 Q. Now, what was the U.S. PTO's final conclusion
9 with respect to Claim 30?

10 A. That it was perfectly valid over the Allen
11 patent.

12 Q. And what was the PTO's conclusion with respect
13 to Claims 31 and 33?

14 A. The same, that they were valid over the Allen
15 patent.

16 Q. Now, Dr. Rhyne, have you evaluated and given
17 opinions with respect to the benefits -- the incremental
18 benefits of the Rice patent over the prior art?

19 A. I think to some degree, I have.

20 Q. All right. And what -- what benefit did --
21 what's your opinion, if any, as to what incremental
22 benefits the Rice patent offered over -- when -- when
23 Google moved from the dumb ad system to the SmartAds
24 system in 2004?

25 A. I think there was actually testimony to the

1 effect that using the smarter approach of the SmartAds
2 Selection System that Google obtained higher relevancy
3 and got more clickability out of the ads that were
4 presented back to people who really didn't ask for the
5 ads; they were doing searches.

6 And if they searched for Las Vegas, as an
7 example, the quality of the ads, the relatability of the
8 ads, the matchability of the ads was improved enough
9 that they felt like that they were going to get
10 significant financial benefit out of it, because people
11 who were searching would be more likely to click on an
12 ad.

13 Q. Do you find that any of the revenue from
14 Yahoo!'s Sponsored Search is attributable to this
15 invention in the asserted claims?

16 A. I do. I haven't done -- I'm not Dr. Becker or
17 any of the other two people, but, clearly, the reason
18 people clicked on ads is because they saw an ad that
19 interested them when they were probably about other
20 business.

21 And having a more relative -- relevant ad
22 presented over on the side or at the top certainly is
23 likely to increase the clickability on those ads.

24 Q. And if it increases the clickability, what --
25 what effect on the --

1 A. The advertiser makes more money, and Google
2 and Yahoo! make more money.

3 MR. FENSTER: Pass the witness.

4 THE COURT: Anything in addition?

5 MR. VERHOEVEN: Go to DX Demo 55.

6 RECROSS-EXAMINATION

7 BY MR. VERHOEVEN:

8 Q. Very briefly, Dr. Rhyne, and I'll be done.
9 So we were just talking about the clicking on the ads.

10 A. Yes, sir.

11 Q. Or Mr. Fenster was, right?

12 A. (No response.)

13 Q. Do you remember this picture I showed you on
14 cross?

15 A. I think so.

16 Q. Okay. This is what happens when you get
17 search results back, right?

18 A. Yes.

19 Q. You get a screen like this?

20 A. Yes.

21 Q. Okay. From my client, Google, right?

22 A. Yes.

23 Q. And here's where the ads are?

24 A. Yes.

25 Q. And you agree that if I'm a user and I click

1 on this ad, that's an interactive electronic message,
2 right?

3 A. Yes.

4 Q. That's not an infringing act, is it, sir?

5 A. Well, if I under --

6 Q. Can you answer that yes or no, sir?

7 MR. FENSTER: Your Honor --

8 Q. (By Mr. Verhoeven) Clicking -- clicking on
9 this ad is not an infringing act under any claim of the
10 '947 patent, correct? Yes or no.

11 A. I'm trying -- there's a lot of nos in there.
12 I think the answer is yes.

13 MR. VERHOEVEN: No further questions.

14 RECROSS-EXAMINATION

15 BY MR. ROOKLIDGE:

16 Q. Dr. Rhyne, I think you and I both agree that
17 the term -- phrase, electronic message, is a very broad
18 term.

19 A. I have not tried to describe any particularly
20 narrow term on it, given such things as the teaching in
21 the patent.

22 Q. Right. Now, the patent's preferred
23 embodiment, that -- it has a lot of disclosure about how
24 to handle is e-mails, correct?

25 A. Yes.

1 Q. And it has this -- this little section here
2 that mentions other types of electronic messages within
3 the scope of the invention, correct?

4 A. Yes.

5 Q. And the scope of the invention is dictated by
6 the claims, right?

7 A. From a legal point of view, as I understand
8 the process, is each claim defines a scope of an
9 invention.

10 Q. That's correct. And the -- we agree.

11 A. Thank you.

12 Q. And the claims that are involved in this case
13 use the phrase electronic message rather than e-mail,
14 correct?

15 A. Yes.

16 Q. Okay. And we've got this passage here about
17 the electronic messages, preferably an e-mail message in
18 ASCII text data format, as being understood that the
19 invention is not so limited. Indeed, the electronic
20 message may take on a variety of data formats, including
21 digital formats, voice data, dual tone multifrequency
22 tones, and the like.

23 And then it goes on in a short passage in the
24 patent to talk about how you would apply this message to
25 voice data, right, voicemail?

1 A. I don't remember that. I haven't looked at
2 that paragraph --

3 Q. Okay.

4 A. -- passage in a while.

5 Q. Is there any discussion in the patents
6 anywhere about how you take this e-mail system that's
7 the preferred embodiment, and you adapt it to make it
8 work with television broadcasts?

9 A. I don't recall any, if there is.

10 Q. Is there any discussion in the patent of how
11 to take this preferred embodiment e-mail system and
12 teach one of ordinary skill in the art how to adapt it
13 to satellite signals?

14 A. I don't remember a specific citation to
15 satellite signal.

16 Q. Morse Code?

17 A. You asked me that earlier, and I said I don't
18 remember the context in which Morse Code has arisen.

19 Q. Is there any teaching of how to take this
20 preferred embodiment e-mail system and adapt it so it
21 will work with http messages?

22 A. I think it's much closer to that than, say,
23 Morse Code.

24 Q. Is there any teaching in the '947 patent about
25 how to take the preferred embodiment, which is an e-mail

1 processing system, and adapt it so it can work with
2 search queries?

3 A. I don't believe that -- that -- somebody asked
4 me whether search queries were mentioned, and I don't
5 recall ever seeing that at all.

6 Q. Is there any teaching within the confines of
7 the '947 patent about how to take this preferred
8 embodiment e-mail system and adapt it to make it into a
9 search engine or an engine that will return search ads?

10 A. I don't recall that as an -- as an example.
11 It seems to me, the only preferred embodiment was the
12 e-mail system.

13 MR. ROOKLIDGE: No further questions.

14 THE COURT: Mr. Fenster?

15 MR. FENSTER: Your Honor, I was really
16 ready to excuse the witness, but...

17 REDIRECT EXAMINATION

18 BY MR. FENSTER:

19 Q. Dr. Rhyne, are you familiar with the level of
20 a person of ordinary skill in the art as applied to this
21 patent?

22 A. There have been some variances as to which
23 each of the experts have stated it, but, generally, I
24 am.

25 Q. And do you have an opinion as to whether one

1 of skill in the art would have understood that the
2 patent fully supports the inventions disclosed in the
3 asserted claims?

4 A. Yes.

5 MR. FENSTER: Your Honor, I have no
6 further questions.

7 MR. VERHOEVEN: Nothing further from
8 Google.

9 MR. ROOKLIDGE: Nothing further from
10 Yahoo!, Your Honor.

11 THE COURT: Okay. Step down, Dr. Rhyne.

12 THE WITNESS: Thank you.

13 THE COURT: Who will be your next
14 rebuttal witness?

15 MR. FENSTER: Your Honor, I'm very
16 pleased to report that Bright Response would rest.

17 THE COURT: Okay. You close?

18 MR. FENSTER: Yes, we do, Your Honor.

19 THE COURT: Defendant close?

20 MR. VERHOEVEN: Yes, Your Honor.

21 MR. ROOKLIDGE: Yes, Your Honor.

22 THE COURT: All right. Ladies and
23 Gentlemen, we're at a milestone. All the evidence is
24 now in.

25 I've got some matters to take up with the

1 lawyers this afternoon. The staff and I have been
2 working on the Court's instructions, and we will hear
3 final arguments starting at 8:30 in the morning, and
4 you'll get the Court's Charge.

5 I suggested to you yesterday that I'm
6 available to stay if you want to begin your
7 deliberations tomorrow. All I'm trying to tell you is
8 that after you get the Court's final instructions,
9 you're in charge of your own schedule.

10 If you want to work part of the day
11 tomorrow, that's fine. If you want to work a full day,
12 that's fine. If you want to go back to your families
13 for the weekend, that's fine, too, and we'll just pick
14 up with deliberations on Monday morning.

15 So that's -- I'm just -- the schedule is
16 up to you. Just let me know sometime tomorrow morning,
17 after the case is submitted to you, what you wish to do,
18 okay?

19 Thank y'all. Please remember my
20 instructions, and don't talk about the case.

21 LAW CLERK: All rise.

22 (Jury out.)

23 THE COURT: All right. Y'all have a
24 seat.

25 I've distributed to you a Court's first

1 draft of the jury instructions and verdict form. Can we
2 have a delegation downstairs in about 15 minutes to have
3 a Charge -- an informal Charge conference?

4 MR. VERHOEVEN: Yes, Your Honor.

5 MR. SPANGLER: Yes, Your Honor.

6 THE COURT: We'll do that, and what we'll
7 do is -- my procedure will be to hear you in chambers on
8 what your concerns are. We'll -- we may make some
9 revisions to the Charge after we visit in chambers, and
10 I'll have my clerks e-mail you a copy this evening.
11 That will be the one that most likely -- unless I hear
12 something in the morning that really causes me some
13 concern, that will be the one you need to plan on me
14 using.

15 I will -- you know, you can use copies of
16 the Charge in your final arguments. You can use the
17 verdict form. You can tell the jury how you think they
18 ought to answer the questions. All that's permissible
19 with me.

20 You can make blowup slides. I don't
21 care. It doesn't matter to me. But just bear in mind
22 that the copy you get this evening will probably be the
23 final copy that will be submitted to the jury.

24 MR. FENSTER: Your Honor?

25 THE COURT: Yes.

1 MR. FENSTER: One inquiry, and I
2 apologize if we already addressed this at the pretrial.
3 Have we gotten timings for closing?

4 THE COURT: I didn't address it at the
5 pretrial. My -- I was going to give 40 minutes to the
6 Plaintiff, 20 to Google, and 15 to Yahoo! in accordance
7 with my prior order.

8 MR. FENSTER: Thank you, Your Honor.

9 MR. VERHOEVEN: Google would request 30.
10 It's going to be awful hard for me to do closing in just
11 20 minutes, Your Honor.

12 THE COURT: I'll think about it.

13 MR. VERHOEVEN: Thank you, Your Honor.

14 THE COURT: I'm not going to -- the
15 Plaintiff's got a burden against both Defendants, so
16 whatever time I'm giving the Defendants collectively,
17 I'm going to give the Plaintiff the same amount of time.

18 MR. VERHOEVEN: That's fine with us, Your
19 Honor.

20 THE COURT: Well, I gathered that.

21 MR. ROOKLIDGE: Your Honor,
22 correspondingly, Yahoo! would request 22-1/2 minutes.

23 MR. VERHOEVEN: And one final --

24 THE COURT: Then get some math performed.

25 MR. VERHOEVEN: I'm sorry. One final

1 thing. Did you say we should stick around also for
2 argument? We had a side-bar, and I wasn't sure.

3 THE COURT: Oh, for motions for judgment
4 as a matter of law?

5 MR. VERHOEVEN: Yeah. Is that tonight
6 or --

7 THE COURT: Well, I would prefer to do it
8 at 8:00 in the morning in conjunction with the final
9 Charge objections. You're going to know what I'm going
10 to submit to the jury by then.

11 And I would -- I'm not going to entertain
12 another hour-and-a-half of argument on motions for
13 judgment as a matter of law. I will allow you to
14 present short arguments, and I'll grant leave to both
15 parties -- both sides, rather, to more fully elaborate
16 on those in written submissions.

17 MR. FENSTER: And, Your Honor, when would
18 you like to hear JMOLS from Plaintiff?

19 THE COURT: At the same time.

20 MR. FENSTER: At 8:00 o'clock.

21 THE COURT: At the same time. I mean,
22 it's -- you know, you can -- as long as you fairly state
23 the grounds on which you're moving, I'm okay with
24 allowing you to supplement it in writing. What I don't
25 want to get is, when I see the written materials, it

1 includes completely new grounds, okay?

2 MR. VERHOEVEN: Understood, Your Honor.

3 THE COURT: All right. I'll see you
4 downstairs in 15 minutes.

5 LAW CLERK: All rise.

6 (Court adjourned.)

7 * * * * *

8

9 CERTIFICATION

10

11 I HEREBY CERTIFY that the foregoing is a
12 true and correct transcript from the stenographic notes
13 of the proceedings in the above-entitled matter to the
14 best of my ability.

15

16

17

18 /s/_____
SUSAN SIMMONS, CSR
19 Official Court Reporter
State of Texas No.: 267
20 Expiration Date: 12/31/10

Date

21

22

23 /s/_____
JUDITH WERLINGER, CSR
24 Deputy Official Court Reporter
State of Texas No.: 731
25 Expiration Date: 12/31/10

Date